

# **Corruption in Education: A Global Legal Challenge**

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## I. The Continuing Challenge of Ethics in Academia

In every educational institution, in every country and generation,<sup>1</sup> there is a struggle between corrupt practices and the continuing quest for high ethical standards.<sup>2</sup> In many instances the problems are blatant, as where bribes are taken by college or university officials in exchange for academic favors;<sup>3</sup> fraudulent invoices are submitted for payment;<sup>4</sup> or funding is wasted on lavish<sup>5</sup> or unauthorized<sup>6</sup> spending, or on private, rather than institutional, purposes.<sup>7</sup> In other

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<sup>1</sup> Corruption at the university level can be traced back in India to a time predating the growth of universities in the West. See Jeffrey E. Garten, *Really Old School Higher Education in Asia*, INT'L HERALD TRIB, Dec. 11, 2006, at 8, 2006 WLNR 21360007 (discussing possibly re-establishing Nalanda University, "one of the first great universities in recorded history," which was founded in Northeastern India in 427 and expired in 1127 as a result "declining financial support and corruption among university officials").

<sup>2</sup> Cf. Editorial, *Needless Student Loan Subsidies*, N.Y. TIMES, Apr. 18, 2007 (discussing Congressional hearing to "root out" corruption in the student loan industry); Janet Frankston Loren, *Critic Sues N.J. Medical School; Official Claims Harassment*, REC. N. N.J., Nov. 30, 2006, at A13, 2006 WLNR 20701668 (discussing a "whistleblower" suit by a financial manager who claimed that for "four years he repeatedly tried to report to university officials . . . the medical school's illegal and unethical billing and accounting practices").

<sup>3</sup> See James Pinkerton, *Bribe Culture Seeps into South Texas*, HOUS. CHRON., Dec. 16, 2006, at A1, 2006 WLNR 21887806 (discussing a "culture of bribery" that has spread to schools, and noting that a school superintendent and trustees were convicted of taking kickbacks or bribes); Renata Kosc-Harmatiy, *Fulbright Ukraine Discusses the Idea and Relevance of the University*, in *FULBRIGHT UKRAINE 2004* (Myroslava Antonovych ed.) (indicating that a student participant in a conference in Ukraine reported that a "professor wanted to teach them what it was like to work in the legal world, where everything including exam grades could be bought, and personally encouraged corruption during exams"). See also note 48 *infra*.

<sup>4</sup> See Robert Patrick, *College Employee Admits Stealing \$400,000*, ST. LOUIS POST-DISPATCH, Mar. 13, 2007 (discussing a facilities manager, charged with overseeing and approving payments, who admitted stealing hundreds of thousands of dollars using fake invoices); *Federal Monitor Takes Control at Med School*, REC. N. N.J., Dec. 30, 2005, at A01, 2005 WLNR 22319392 (discussing a medical university's double-billing of the government).

<sup>5</sup> See Juan A. Lozano, *Texas Southern U. Ex-financier Convicted*, HOUS. CHRON., May 3, 2007) (reporting that the former chief financial officer of a university "diverted \$286,000 . . . into secret accounts that [the] then-president . . . used to buy furniture, landscaping and a high-tech

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security system for her home”); Eden Laikin & Karla Schuster, *Calling for a Watchdog*, NEWSDAY, Sept 26, 2006, at A07, 2006 WLNR 16646855 (discussing a grand jury report stating that, in New York, “[m]embers of certain boards of education blindly approved their superintendents’ requests and recommendations regarding salary increases and fringe benefit awards,” and calling for a new state office to investigate waste and fraud in schools); Alan Finder, *Senate Panel to Review American U. Board’s Actions on Spending*, N.Y. TIMES, Dec. 3, 2005, at A20, 2005 WLNR 19467626 (discussing a Senate inquiry into lavish spending by a private university president, which included “professional development” trips to Britain, France and Italy for the . . . president’s chef and expenditures of more than \$101,000 on a social secretary who, according to university board members, worked on the president’s personal services, not university events); Joe Mathews & Peter Y. Hong, *Perks Bring D.A. Probe at College*, L.A. TIMES 1, Aug. 31, 2003, 2003 WLNR 15176641 (reporting that officials at a California community college “spent hundreds of thousands of taxpayer dollars . . . on contracts that they refuse[d] to explain, while receiving costly perks not commonly available to directors of much larger district”). See also Sam Dillon, *College Administrator’s Dual Roles are a Focus of Student Loan Inquiry*, N.Y. TIMES, Apr. 13, 2007 (reporting that the Pennsylvania Higher Education Assistance Authority, a state loan agency, faced “calls for reform after reports that board members, spouses and employees have spent \$768,000 on pedicures, meals and other such expenses since 2000”).

<sup>6</sup> See *NSUI Holds Protests Against Bhoj Varsity*, HINDUSTAN TIMES, Sept. 15, 2006, 2006 WLNR 16106367 (discussing student protests against a university’s purchase of material “without floating any tenders”); Raymond Li, *Ex-University Head Expelled from NPC; Improper Investment Led to Huge Losses at Tianjin Institution*, S. CHINA MORNING POST, Nov. 23, 2006, at 7, 2006 WLNR 20274296 (discussing unauthorized investments that caused a university serious financial losses); Marla Jo Fisher, *Troubled California College Faces Uncertain Future*, COMMUNITY COLLEGE WEEK, July 19, 2004, at 2, 2004 WLNR 5875653 (discussing corruption where, among other things, “books ostensibly were ordered for the campus library but delivered to mysterious off-campus sites”). See also Robin Demonica, *Two-Year Colleges: Rebuild from Ground Up*, BIRMINGHAM NEWS (AL), July 16, 2006, at 2, 2006 WLNR 12421154 (discussing \$800,000 in misspent funds and other problems at an Alabama community college). Cf. Tim Sullivan, *Cheaters Prosper if Permitted*, SAN DIEGO UNION-TRIB., Mar. 12, 2003, at D1, 2003 WLNR 13390747 (reporting that the president of one major university was “forced to explain how he came to hire a coach who was fired for lying about his expense account” at another major university).

<sup>7</sup> See *University Official Jailed for “Investing” College Funds*, S. CHINA MORNING POST, Dec. 6, 2006, at 4, 2006 WLNR 21012981 (reporting that a Guilin, China, university finance officer was sentenced to 15 years in jail for using university money to buy stocks) (hereinafter “*University Official Jailed*”). See also Brian Leftow, *Opinion: Leave Those in the Know to Manage the Show*, TIMES HIGHER EDUC. SUPP., Nov. 9, 2006, at 14, 2006 WLNR 19606190 (stating that the “Federal Bureau of Investigation and the Justice Department are

cases educational corruption is more subtle. This is true where conduct that is neither criminal, fraudulent, nor a breach of fiduciary duty nevertheless undercuts the moral foundations of the educational enterprise. For example, if academic honors, such as membership in a learned society, are conferred based not on merit, but on political loyalty, the process is arguably corrupt.<sup>8</sup> Such an award, like “giving grades to athletes for little or no work,”<sup>9</sup> or helping students to cheat on exams,<sup>10</sup> erodes the intellectual integrity of the institution. When that happens, the educational enterprise is diminished in a very real sense.<sup>11</sup>

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probing cases of trustee corruption that have cost universities millions of dollars . . . [and] that the US Congress has launched a general investigation”).

<sup>8</sup> Of course, reasonable minds can differ as to what is meritorious. Yet, at some point, the divergence between the criteria and the qualifications of the recipient will be so great that it will be clear that the award results not from a difference of opinion but from a repudiation of the criteria. A useful analogy might be drawn to the rule governing liability for misrepresentation in the American law of torts. “Puffing”—the practice of taking a favorable view of the facts—is permitted. But where the facts are wholly at odds with the statement made, the unwarranted characterization is actionable. See RESTATEMENT (SECOND) OF TORTS § 542 cmt. e (1977) (stating that buyers are not entitled to rely upon “puffing”); *Baker v. Dorfman*, 239 F.3d 415, 423 (2d Cir. 2000) (finding that statements in an attorney’s resume went beyond puffing and “were either false or grossly misleading”). See also Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 551-52 (2004) (discussing the difference between “puffing” and unduly favorable statements of fact that give rise to liability).

<sup>9</sup> See Editorial, *Top Grades, Without Classes*, N.Y. TIMES, Dec. 20, 2006 (reporting that Auburn University “is embroiled in a scandal involving athletes who are said to have padded their grades and remained eligible to play by taking courses that required no attendance and little if any work”); Rachel Bachman, *Keeping Whistle-Blowers Anonymous*, PORTLAND OREGONIAN, Nov. 6, 2006, at E01, 2006 WLNR 19307515 (discussing corruption in college athletics). See also n. 97.

<sup>10</sup> Cf. Frank Kummer, *Leaders Aim to Curb Cheating on Tests*, PHILA. INQUIRER, Oct. 26, 2006, at A01, 2006 WLNR 18537163 (discussing cheating on standardized tests and related problems, including teachers “giving tips to students, erasing answers, and filling in blank answers”).

<sup>11</sup> Such corruption in education unfortunately finds precedent in politics. As Ukrainian scholars have noted, awarding membership in a learned society to a person who is clearly unqualified “is somewhat similar to the well known historical fact . . . [that] Emperor Caligula made his horse a Senator.” Myroslava Antonovych & Oleksandr Merezko, *Corruption as a Problem in Ukraine’s Scholarship and Education*, in 11 THE FULBRIGHTER IN UKRAINE 2, 4 (Nov. 2006), available at <http://www.fulbright.org.ua/app/newsletter/11.pdf> (last visited Apr. 22,

Just as a “country is poorer overall if corruption levels are high,”<sup>12</sup> so too an educational institution is poorer if its members engage in corrupt practices. Such misfeasance wastes limited resources, demoralizes participants, and adversely affects productivity.<sup>13</sup>

Educational corruption comes in many forms. A distinction may be drawn between widespread institutional corruption<sup>14</sup> and the corruption of renegade individuals within an otherwise ethically sound educational program.<sup>15</sup> The latter is as morally repugnant as the former, with the caveat that such individual corruption may be easier to correct (e.g., through prosecution or expulsion) and may cause harm that is less far ranging.<sup>16</sup> Institutional corruption is not only ethically odious and difficult to remedy, but also socially dangerous, for it strikes at the very core of democratic institutions. According to Edmund Burke, “[a]mong a

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2007). See also Peter Delevett, *Shedding Light on Roman Legend Team Raises Questions about Emperor*, SAN JOSE MERCURY NEWS, Sept. 7, 2003, at 1B, 2003 WLNR 14962652 (indicating that “[h]istorians have long doubted many . . . outrageous claims” about Caligula, but that the recent discovery by a team of Stanford archaeologists of the ruins of Caligula’s palace “appears to confirm an ancient account by Suetonius” and has caused scholars to now wonder what other “wild stories” about the emperor might be true).

<sup>12</sup> SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 3 (1999).

<sup>13</sup> Cf. *id.*, at 3 (noting that “[c]ross-country empirical work has confirmed the negative impact of corruption on growth and productivity).

<sup>14</sup> See Mark Johnson, *Student Loan Scandal Likely to Spread*, SAN ANTONIO EXPRESS-NEWS, Apr. 11, 2007, at 4A (quoting the attorney general of New York as comparing an investigation into “[cozy] arrangements” between colleges and private lenders to “peeling an onion,” because the problems are “more widespread than we originally thought”); Sullivan, *supra* note 6 (quoting the commissioner of the West Coast Conference as stating that “some [educational] institutions make business decisions to cheat” at football.); Rebecca Trounson, *Shake-Up at Nuclear Facility*, L.A. TIMES, Jan. 3, 2003, at 1, 2003 WLNR 15171001 (discussing an alleged culture of corruption at a laboratory managed by the University of California). Cf. Dillon, *supra* note 5, 106 (discussing allegations of “structural corruption of the student lending system”).

<sup>15</sup> See Goh, *supra* note 31 (quoting an expert drawing this distinction with respect to corruption in China).

<sup>16</sup> But see Pinkerton, *supra* note 3 (quoting a former FBI agent as stating that even “[w]hen [only] a few abuse their offices . . . citizens justifiably wonder then who can they trust in the rest of government”).

people generally corrupt liberty cannot long exist.”<sup>17</sup>

In this article, the terms “corrupt” and “unethical” are not used synonymously. All corrupt practices are unethical, but not all unethical practices are corrupt. For example, certain forms of university medical research—such as embryonic stem cell studies—may or may not be unethical,<sup>18</sup> but so long as that research is carried on honestly and fairly within the bounds of the law, corruption is not a problem. Similarly, a professor’s biased editing of digital video clips<sup>19</sup> or a university’s retailing of apparel made in low-wage countries<sup>20</sup> may be unethical, but those practices are not necessarily corrupt.

As discussed in this article, corruption in education entails (1) serious criminal conduct, (2) tortious conduct in the nature of fraud<sup>21</sup> or intentional breach of fiduciary duty,<sup>22</sup> or (3)

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<sup>17</sup> Antonovych & Merezhko, *supra* note 11, at 2 (quoting Burke in 1777 and opining that blatant corruption which becomes part of daily routine “presents the worst threat to Ukrainian democracy”).

<sup>18</sup> See Editorial, *Loosening the Stem Cell Bind*, N.Y. TIMES, Apr. 13, 2007 (discussing disparate views on the morality of embryonic stem cell research).

<sup>19</sup> See Sandy Schuck & Matthew Kearney, *Using Digital Video as a Research Tool: Ethical Issues for Researchers*, J. EDUC. MULTIMEDIA & HYPERMEDIA, Dec. 22, 2006, at 447, 2006 WLNR 19184269 (discussing video selection, editing, and use).

<sup>20</sup> See Richard Nangle, “*Sweatshop Fashion Show*”: *Clark Students Take to Runway to Expose Abuses*, TELEGRAM & GAZETTE (Worcester), Dec. 1, 2006, at B1, 2006 WLNR 20909406 (discussing a protest of clothing from low-wage countries sold in a university bookstore).

<sup>21</sup> Deceit is the tort action for fraud which offers a remedy for false or misleading statements that are made with “scienter”—meaning knowledge of falsity or reckless disregard for the truth. See RESTATEMENT (SECOND) OF TORTS §§ 525-51 (1965) (discussing fraudulent misrepresentation).

<sup>22</sup> Breach of fiduciary duty is a tort. See RESTATEMENT (SECOND) OF TORTS § 874 (1979) (stating that “[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation”). Like many other torts, liability can arise from intentional violation of the demanding responsibilities imposed on fiduciaries, or as a result of the lack of care (negligence or recklessness). Cf. RESTATEMENT, THIRD, OF THE LAW GOVERNING LAWYERS § 49 cmt. e (2000) (recognizing that breach of fiduciary duty can be based on negligence or intent). Corruption implies a venality which requires more than carelessness. Thus, this article equates only intentional breach of fiduciary duty with corruption.

conduct that betrays the values that form the moral basis for the educational process, foremost among those being intellectual honesty. In order to constitute educational corruption, conduct must relate to the performance of educational duties. Persons associated with colleges or universities may engage in criminal conduct in their private lives that has no direct connection to the work of the educational enterprise. That conduct is not properly viewed as corruption, even though the misconduct may indirectly reflect adversely on the educational institution. If a professor is charged with spying on a foreign government, the charges do not raise an issue of educational corruption unless the alleged spying involved the performance of university duties.<sup>23</sup> The same is true if a university administrator is alleged to have molested a student<sup>24</sup> or obtained a teaching or administrative position by presentation of fraudulent credentials.<sup>25</sup> To be corrupt, conduct must also harm or tend to harm, in a significant way, either the educational institution, its constituents, or its beneficiaries.<sup>26</sup> Conduct that neither causes, nor is likely to cause, harm is not “corrupt” in the sense that the term is used in this discussion.

Corrupt educational practices often relate to the work of college and university employees, such as faculty members and administrators. However, cheating by students is also a form of corruption because it betrays the values that underlie the educational process and relates to students’ performance of their duties as members of the academic community.

Corruption in education must be distinguished from both incompetence and imprudence. An educational institution that employs inept teachers or fails to prepare its students adequately for their chosen careers is incompetent in those respects because the institution fails to possess or exercise the knowledge and skills that its programs require. However, that institution is not

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<sup>23</sup> Cf. *Florida International Professor, Wife Plead Guilty to Reduced Charges in Cuba Spying*, UB DAILY, Dec. 21, 2006 (citing Gainesville.com/Associated Press).

<sup>24</sup> See *Tripartite Commission to Meet in Kabul Punjab Govt. Asked to Send Report Regarding Corruption of VC Faisalabad University, NA Told*, FRONTIER STAR (AsiaNet-Pak.), Aug. 22, 2006, 2006 WLNR 14750786 (discussing allegations against a vice chancellor in Pakistan).

<sup>25</sup> See Tamar Lewin, *Dean at M.I.T. Resigns, Ending a 28-Year Lie*, N.Y. TIMES, Apr. 27, 2007 (discussing a university dean of admissions who fabricated her own educational credentials); *Another Govt Teacher with Fake Degrees Held*, ECON. TIMES, June 11, 2003, 2003 WLNR 4323668 (discussing various cases).

<sup>26</sup> Other writers sometimes define corruption differently. See, e.g., Antonovych & Merezko, *supra* note 11, at 2 (defining corruption in education as “the situation when public and governmental resources and/or positions are used not for public or common benefit, but for private benefit of a person or group of persons. Corruption in scholarship and education often implies degradation due to violation of certain ethical standards”). This article treats improper economic benefit as merely one type of educational corruption. See Part IV-B-2-a.

inevitably corrupt. Further, a school that wastes the time and money of students on the study of insignificant subjects may be imprudent, but that lack of wisdom does not automatically signal the malignancy of corruption.

This article focuses on higher education, but in some instances draws examples from other contexts, such as primary and secondary schools and non-traditional educational programs. Part II of this article offers examples of educational corruption from around the world for the purpose making clear the multi-faceted nature of the problem and illustrating that related challenges observe no geographic boundaries. Educational corruption exists in every culture. Part III considers the basic principles that should shape efforts to deter, expose, and penalize corruption in academic institutions. Part IV then translates those principles into “best practices” that should be followed by educational enterprises aspiring to high standards. Some of those best practices relate to the role that ethics codes and laws can play in fighting educational corruption. Part V explores the ethical unacceptability of certain practices of recurring importance, such as buying admission into an education program,<sup>27</sup> plagiarism,<sup>28</sup> and bogus degrees.<sup>29</sup> Part VI offers concluding thoughts about the never ending battle between corruption and ethics in academia.

## II. Educational Corruption Around the World

### A. Other Countries

Around the world, there is no shortage of corruption in education. This is not surprising, for self-interest, a primary contributing factor in corruption, is universal.<sup>30</sup> News media and other sources carry reports from across the globe documenting the pervasive nature of the problem.

In China, “children are supposed to attend schools closest to their homes, but parents can put their children in better-performing ones far away by giving gifts to these schools.”<sup>31</sup> This is but one small instance of a much larger problem whereby *guanxi*<sup>32</sup>—relationships or connections,

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<sup>27</sup> See Part V-A.

<sup>28</sup> See Part V-B.

<sup>29</sup> See Part V-C.

<sup>30</sup> Cf. ROSE-ACKERMAN, *supra* note 12, at 2 (noting that critics call the self-interest that contributes to corruption “greed,” but that economists call it “utility maximization”).

<sup>31</sup> Goh Sui Noi, *Can China Stem the Corruption Surge in Time?*, STRAITS TIMES (Sing.), Oct. 14, 2006, 2006 WLNR 17793528.

<sup>32</sup> See generally Vincent R. Johnson, *America’s Preoccupation with Ethics in Government*, 30 ST. MARY’S L.J. 717, 720-21 (1999) (stating that “[a]t its worst, *guanxi* is akin to



often based on reciprocal favors<sup>33</sup>—are used in China to secure preferred treatment in all manners of endeavor.<sup>34</sup> Not surprisingly, “Peking University’s listing of the mobile phone numbers of the teachers responsible for recruiting students on application forms” raised suspicions of corruption. The *Chengdu Business Daily* claimed that applicants were being “tempted to call the responsible teachers and offer them bribes to look on their applications favourably.”<sup>35</sup> According to some sources, “[b]ribes are routinely paid to middlemen who claim a close relationship with [Chinese] university enrollment officers.”<sup>36</sup> Public corruption in China is believed to be widespread.<sup>37</sup> In

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corruption and . . . undermines adherence to the rule of law”).

<sup>33</sup> See John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT’L L. 329, 375 (2006) (stating that “[o]ften viewed by outsiders . . . as a corrupted system of cronyism and bribery, *guanxi* suggests relationships that include mutual obligation, reciprocity, goodwill, and personal affection. . . . There are three levels of *guanxi*: 1) the highest, inner circle for family members, 2) non-family members who have a significant connection based on trust or shared experience, and 3) strangers who are not known and not trusted); Ted Hagelin, *Reflections on the Economic Future of Hong Kong*, 30 VAND. J. TRANSNAT’L L. 726, 734 n.113 (1997) (citing BOYE LAFAYETTE DEMENTE, *CHINESE ETIQUETTE AND ETHICS IN BUSINESS* (2d ed. 1994), and stating that “[g]*uanxi* (pronounced ‘gwahn-shee’) is the network of personal connections which governs virtually every facet of Chinese society, both public and private”). See also Ryan P. Johnson, *Steal This Note: Proactive Intellectual Property Protection in the People’s Republic of China*, 38 CONN. L. REV. 1005, 1035 (2006) (defining *guanxi* as “crucial ‘connections,’ or mutually beneficial business relationships”).

<sup>34</sup> Cf. Keith Bradsher, *For eBay, Its About Political Connections in China*, N.Y. TIMES, Dec. 22, 2006 (reporting that eBay’s decision to close its China website and instead partner with a Beijing company controlled by Hong Kong’s wealthiest tycoon, who had cultivated close relationships with top Communist leaders for decades, was a sign that “connections matter in Chinese business”).

<sup>35</sup> *Peking University Admission Procedure Comes Under Fire*, S. CHINA MORNING POST, June 11, 2003, at 7, 2003 WLNR 6014294.

<sup>36</sup> Robert Cottrell, Charles Emmerson, Victoria Griffith, Jim Kelly and James Kynge, *How to Influence People and Gain Degrees: In Oxford, Moscow, New York and Beijing, the High-Minded Pursuit of Learning Can Be Aided by Judicious Use of M*, FIN. TIMES, Mar. 30, 2002, available at <http://search.ft.com/searchArticle?id=020330001519&query=corruption> (last visited Jan. 12, 2006).

<sup>37</sup> See Quentin Sommerville, *China Steps Up Corruption Fight*, BBC NEWS, SHANGHAI, Feb. 14, 2007, at <http://news.bbc.co.uk/2/hi/asia-pacific/6361155.stm> (last visited Feb. 15, 2007) (reporting that in 2006, “97,000 officials were found guilty of bribe-taking or breaching financial rules”).

many cases, educational funding in China is misused for improper investments.<sup>38</sup>

In Turkey, a university rector was recently tried on corruption charges alleging “fraud in a \$25 million tender, forming a criminal group to defraud the university and . . . improperly compiling personal information on . . . university employees and students.”<sup>39</sup> Subsequently, the chairman of the national Higher Education Board and 77 other university rectors faced “the threat of a criminal investigation for allegedly trying to illegally influence the judicial process . . . [by] comments they made during the trial.”<sup>40</sup>

In Australia, a “lecturer . . . gave 15 students at a partner institution in Malaysia zero marks for using material off the Internet verbatim without attribution, only to find the papers were reassigned to another lecturer who passed the students and awarded credits and distinctions.”<sup>41</sup>

In Thailand, charges and counter-charges have swirled over whether tutorial school operators made “payments to education officials in return for access to examination papers” and about whether those investigating the alleged wrongdoing were actually seeking to protect the persons suspected of corruption.<sup>42</sup>

In Italy, police identified approximately twenty students who, as victims of extortion, paid tens of thousands of dollars to instructors after allegedly being told “that unless they paid up they would never pass a certain exam.”<sup>43</sup>

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<sup>38</sup> See Li, *supra* note 6; *University Official Jailed*, *supra* note 7.

<sup>39</sup> *Prosecutor to Investigate Rectors and YOK Chairman*, TURKISH DAILY NEWS, Jan. 31, 2006, 2006 WLNR 2212949. See also *Domestic New Line: Rector Athornkyn Back in Court*, TURKISH DAILY NEWS, Dec. 29, 2005, 2005 WLNR 2248563 (discussing the case). A search of the Westlaw Allnews database on Dec. 15, 2006, did not reveal the result of the trial.

<sup>40</sup> *Texic and 77 Rectors Face Investigation*, TURKISH DAILY NEWS, Jan. 31, 2006, 2006 WLNR 2212976.

<sup>41</sup> Graeme Webber, *Uni Cheat Scandal—Multibillion-Dollar Education Export at Stake*, N. TERRITORY NEWS (Australia), Aug. 4, 2003, at 11, 2003 WLNR 7341617 (indicating that the university vice chancellor admitted that staff had failed to follow university policy, but “denied claims the international students had been marked softly because they had paid full fees”).

<sup>42</sup> See Jason Gagliardi, *Thailand Launches Probe into Exam-Bribes Scandal*, S. CHINA MORNING POST, May 29, 2004, at 2, 2004 WLNR 5976439.

<sup>43</sup> Paul Bompard Rome, *Police Look into Exam Racket*, TIMES HIGHER EDUC. SUPP., Aug. 4, 2006, at 11, 2006 WLNR 13533021.

“Corruption, in the form of bribes to gain university entrance or pass exams, was endemic in higher education in the Soviet Union and persists in virtually all post-Soviet states.”<sup>44</sup> In Russia, “the cost of a bribe to get into a top Moscow university can be more than the cost of tuition for all five years of studies.”<sup>45</sup> According to one report, “Russians spend 900 million rubles a year on education, with half of this money coming in bribes.”<sup>46</sup> In Kazakhstan universities, “future doctors are graded according to the amount of money they give professors.”<sup>47</sup> In Kyrgyzstan, students say that at many universities “[o]ne may easily pass any exam by offering a bribe to the university or a particular teacher.”<sup>48</sup> In the words of one Kyrgyzstan university teacher, “If you want something to happen for you, you are supposed to oil the wheels. The amount of a bribe depends how difficult it is to do a ‘favor’ for you.”<sup>49</sup> In Tajikistan, even the Prosecutor-General’s Office acknowledges that “corruption in colleges and universities is normal,” and news reports speculate that “gratification fees” paid by applicants seeking to be enrolled in state-funded programs may extend to competition for scholarships to study abroad because “rumor has it that places can already be bought for a \$2,000-\$5,000 tip to the right person.”<sup>50</sup> In Ukraine, “payoffs received for admission to . . . [an] elite university” are described as “so common . . . that little effort is taken to cover them up.”<sup>51</sup> “Some universities are mini-tyrannies where the university president thinks of himself as the owner/ruler. . . . [I]n

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<sup>44</sup> Vera Rich, *Law Shift Could Trap Dissenting Lecturers*, TIMES HIGHER EDUC. SUPP., Aug. 4, 2006, at 10, 2006 WLNR 13533026.

<sup>45</sup> See *College Cleanup Drive Begins*, MOSCOW TIMES, July 12, 2004, 2004 WLNR 7337339 (hereinafter *College Cleanup*) (reporting a study which found that “corruption is growing in education” and that students “paid bribes of \$30,000 to \$40,000 to get into leading schools like the Moscow State Institute of Foreign Relations,” where five years of tuition costs up to \$37,500”).

<sup>46</sup> *Education Minister Raises the Standard*, MOSCOW TIMES, June 10, 2003, 2003 WLNR 4284934 (citing a study by the Higher School of Public Opinion Foundation) (hereinafter *Education Minister*).

<sup>47</sup> Assoc. Press, *63 Cases of HIV in Children*, AUGUSTA CHRON. (Ga.), Sept. 29, 2006, at A12, 2006 WLNR 17207600.

<sup>48</sup> Dina Tokbayeva, *How to Become a Student?*, TIMES CENT. ASIA (Kyrg.), July 13, 2006, 2006 WLNR 12042689.

<sup>49</sup> *A Losing Battle*, TRANSITIONS ONLINE, May 11, 2004, 2004 WLNR 55715.

<sup>50</sup> *F for Fairness: Prosecutor’s Report Card Finds Universities Failing to Fight Corruption*, TIMES CENT. ASIA (Kyrg.), Aug. 3, 2006, 2006 WLNR 13378109 (hereinafter *F for Fairness*) (discussing bribes to study in Russia, Kazakhstan, Kyrgyzstan, China, and Iran).

<sup>51</sup> Antonovych & Merezko, *supra* note 11, at 2.

one public university the central marble staircase is ‘reserved’ for the rector alone.”<sup>52</sup>

In India, “donations for school admissions”<sup>53</sup> are a common problem, and various corruption controversies have prompted college and university officials to resign<sup>54</sup> or have triggered the filing of charges.<sup>55</sup> However, sometimes those who report corrupt practices succeed only in securing “an immediate transfer to a godforsaken place,” as was true of one college teacher who disclosed that “[c]ollege authorities were collecting money by selling prospectus and admission forms,” which was reportedly “a gross violation of norms in government colleges, where such documents are given to . . . [colleges] by the state.”<sup>56</sup>

In Romania, some college students routinely submit “plagiarized” papers in fulfilment of writing assignments. The lack of originality in those students’ writing may be an unfortunate legacy of communism, which discouraged free-thinking.<sup>57</sup> Yet, plagiarism by students in post-

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<sup>52</sup> *Id.* at 2.

<sup>53</sup> Sreeram Chaulia, *Mammon’s Cesspool*, ASIA TIMES ONLINE (Thailand), Sept. 5, 2003, 2003 WLNR 404804 (reviewing N. VITTAL, *CORRUPTION IN INDIA* 2003).

<sup>54</sup> *See Jiwaji V-C Quits*, HINDUSTAN TIMES, Sept. 23, 2006, 2006 WLNR 16616228 (discussing the resignation of a vice-chancellor).

<sup>55</sup> *See Varsity Official Held on Graft Charge*, HINDU, July 18, 2004, 2004 WLNR 11991553 (reporting charges filed against a university official based on a bribe allegedly demanded and accepted in connection with an examination); *HPU V-C Booked; Kokje Orders Two Probes*, TIMES INDIA, Sept. 4, 2003, 2003 WLNR 9227006 (discussing prosecution of a university vice-chancellor for alleged financial mismanagement).

<sup>56</sup> Aditya Ghosh, *Counter Corruption at Your Own Peril*, TIMES INDIA, Oct. 3, 2002, 2002 WLNR 7681213.

<sup>57</sup> *Cf.* Andrew Kramer, *50% Good News is the Bad News in Russian Radio*, N.Y. TIMES, Apr. 22, at 1 (indicating that in the USSR, “every print or broadcasting outlet was preliminarily censored” and that other restrictions on journalism continue today). Professors find similar copying of answers in other Eastern European countries, and sometimes explain it as a reflection of cultural differences (*see* Kosc-Harmatiy, *supra* note 3 (quoting a conference participant as stating that the attention given to plagiarism in Ukraine is “a result of the West imposing it values across cultural borders. ‘What the West call plagiarism . . . is in actuality Ukranian students helping one another’”)). In China, plagiarism may be attributable there in part to respect for the wisdom of elders—at least where what has been copied is a prestigious text. *Cf.* Brent T. Yonehara, *Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. 63, 79 (2002) (indicating that traditionally in China “[w]isdom through copying was a scholarly effort which proscribed

Communist countries is not inevitable, for students in some Romanian university departments do highly independent, innovative work.<sup>58</sup> There are other systemic problems in Romanian higher education related to buying grades. At one university, professors reportedly even posted the price of grades on the department website.<sup>59</sup>

African universities face widespread problems. In South Africa, there have been criminal investigations of alleged unauthorized borrowing of university funds and kickbacks from procurement deals.<sup>60</sup> In Nigeria, “examination fraud” is “rampant,” and is only one part of the

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respect because it was beneficial to one’s life and society as a whole”).

<sup>58</sup> In 2005, I taught the same course—Ethics in Government—in two schools at the University of Bucharest, Romania, and used the same writing assignments. At the Political Science Faculty, my students invariably submitted original analyses of the problems. However, at the Foreign Languages Faculty, student copying was rampant (despite my exhortations about the importance of independent work). Sometimes fifteen or more papers in a class of forty students would be virtually identical, and another eight or ten would also match substantially.

<sup>59</sup> In spring 2005, I guest lectured at West University, in Timisoara, Romania. The students in the class that I visited were incensed that professors in the chemistry or physics department had audaciously posted the price of grades on the web. We spent a large part of the class discussing why that was inappropriate because the students conceded that professors (and sometimes their secretaries) were routinely paid a “supplement” to ensure good grades. Interestingly, several of the students did not object to the web postings because it was helpful for them to know just how much they needed to pay to receive a particular grade—a sort of bizarre form of consumer protection through price standardization which eliminated uncertainties about the appropriate size of a bribe.

When I returned the University of Bucharest where I was teaching that semester, we spent a very interesting class discussing the ethical differences between the “Romanian system” and the “American system.” In Romania, professors are poorly compensated and students are charged low tuition, but then often have to pay a supplement to faculty members to receive high grades. In America, professors are frequently well paid, students are often charged high tuition, and students get high marks as a result of widespread grade inflation. See Samuel G. Freedman, *On Education; Can Tough Grades Be Fair Grades?*, N.Y. TIMES, June 7, 2006, at B8 (discussing “rampant grade inflation”). See also Letter to Editor, *What Next? Buy-a-Grade?*, ST. PETERSBURG TIMES, Feb. 8, 2003, at 15A, 2003 WLNR 15684204 (discussing a university professor who “admitted he no longer gives grades lower than a B because students would stop signing up for his course and that would hurt his career”).

<sup>60</sup> See Sharda Naidoo, *UDW Probes May Derail Merger Talks*, BUS. DAY (South Africa), Sept. 19, 2003, at 3, 2003 WLNR 9164889.

“corruption on campuses nationwide.”<sup>61</sup> At the Zimbabwe School Examination Council, workers were “fired after it was discovered they had forged [test] results.”<sup>62</sup>

Fortunately, there are also reports showing that educational corruption abroad is strongly condemned.<sup>63</sup> In India, for example, students and others protest university corruption related to construction work, purchases, appointments, and deputations.<sup>64</sup> At the University of Indonesia students have distributed to civil servants thousands of copies of a booklet entitled “Understanding and Eliminating Corruption.”<sup>65</sup> In Papua New Guinea, student leaders have exposed allegedly fraudulent financial transactions, and university staff members have protested

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<sup>61</sup> Olubusuyi Adenipekun, *Stakeholders Proffer Solutions to Vices in Schools*, VANGUARD (Nig.), July 29, 2004, 2004 WLNR 7475275 (discussing a conference called to combat “vices ravaging campuses of higher institutions,” including “examination malpractice, sexual perversion and prostitution, cultism, nudity and indecent dressing, disrespect for constituted authority and corruption”). See also Abdullahi Sule-Kano, *Facts On the Unilorin Crisis*, THIS DAY (Nig.), Nov. 19, 2006, 2006 WLNR 20154329 (discussing alleged “corruption, profligacy, arbitrariness and lawlessness” at a Nigerian university); Bukola Olatunji and Juliana Taiwo, *Unity School Reforms—To Be or Not to Be?*, THIS DAY (Nig.), Oct. 10, 2006, 2006 WLNR 17647823 (discussing charges that Federal Government Colleges have been turned into a “network of corruption” in Nigeria).

<sup>62</sup> Sifelani Tsiko, *Lack of Planning By School Examination Council Worries Parents*, HERALD (Zimb.), Sept. 10, 2003, 2003 WLNR 441135.

<sup>63</sup> Cf. *Police Lenient with IJT Activists*, NATION (Pak.), Oct. 15, 2006, 2006 WLNR 17970704 (discussing protests in Pakistan against “corruption and irregularities, being committed by . . . university management in administrative and financial matters”).

<sup>64</sup> See NSUI, *supra* note 6. See also *Probe Sought into Working of Women’s University*, HINDU, Aug. 3, 2006, 2006 WLNR 13440577 (discussing protesters alleging misappropriation of funds and anomalies in recruitment processes); *Corruption Alleged in Cusat Appointments*, HINDU (India), Dec. 29, 2005, 2005 WLNR 22077493 (reporting that a teacher’s union alleged “that corruption was rampant in the recruitment for posts”). See also *DYFI Demands Ouster of Vice-Chancellor, Registrar*, HINDU (India), July 11, 2006, 2006 WLNR 11956840 (reporting protests against irregularities in university appointments); *Case Against DYFI Activists*, HINDU (India), Jan. 28, 2004, 2004 WLNR 9982209 (discussing a statewide protest of “alleged corruption in the allocation of B.Ed courses to private colleges”).

<sup>65</sup> See Multa Fidrus, *Students Circulate Mug-Shot Collection*, JAKARTA POST, Dec. 9, 2006, at 4, 2006 WLNR 21245486 (describing the activity).

administrative corruption.<sup>66</sup> Likewise, student charges of “misappropriation” of university funds have been made in Liberia.<sup>67</sup>

Sometimes protests turn ugly. In South Africa, for example, violence erupted at a university when students protested an administrative decision not to release a full report of “a commission of inquiry into alleged corruption and mismanagement at the university.”<sup>68</sup> More recently students at a university in eastern China rioted and “ransacked” the campus because college authorities were allegedly “letting people in without the right qualifications and issuing fake diplomas.”<sup>69</sup> Of course, rioting is not the preferred response to corruption, and legal remedies are better for many reasons. Yet sometimes the machinery of justice works too slowly. In Ukraine, a university rector who was convicted of bribery after dozens of students testified against him was not sentenced for many months, causing some observers to question whether punishment would ever be meted out.<sup>70</sup>

News media play an important role in publicizing calls for reform, such as those recently voiced in India and Pakistan by students protesting college “irregularities”<sup>71</sup> or calling for the removal of university officials.<sup>72</sup> In addition, reformers abroad seek to purge corruption from

<sup>66</sup> See Nikints Tiptip, *Goroka Staff Plan Walk-Off*, PNG POST COURIER, Sept. 25, 2006, at 7, 2006 WLNR 16611072 (discussing the University of Goroka).

<sup>67</sup> Alloycious David, *Trouble Imminent At UL*, NEWS (Nig.), Aug. 25, 2006, 2006 WLNR 14774881.

<sup>68</sup> *It's Time for Students to Study Not to Claim Freedom: Judge*, SAPA (S. Afr. Press Ass'n), Feb. 19, 2002, 2002 WLNR 3239054.

<sup>69</sup> Clifford Coonan, *Students Riot Over Fake Diploma Claim*, IR. TIMES, Oct. 26, 2006, at 13, 2006 WLNR 18540433. Occasional rioting in China is due in part to the absence of effective mechanism for legal redress. See Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. \_\_, \_\_ (2007) (discussing a riot in China by students who received diplomas bearing a different name than they had been promised. See also Joseph Kahn, *Rioting in China Over Label on College Diplomas*, N.Y. TIMES, June 22, 2006, at A1, 2006 WLNR 10749995 (discussing the riot).

<sup>70</sup> Interview with Vyacheslav Bihun, Associate Professor of Law, National University of Kyiv-Mohyla Academy Law School, in Kyiv, Ukraine (Sept, 21, 2006).

<sup>71</sup> *AU Students Gherao Board of Trustees President*, HINDUSTAN TIMES, Sept. 25, 2006, 2006 WLNR 16689933.

<sup>72</sup> Cf. *IJT Stages Protest Rallies for Restoration of Union's Elections*, FRONTIER STAR (AsiaNet-Pak.), Nov. 30, 2006, 2006 WLNR 20754244 (discussing a call for removal of an official at the University of Peshawar, Pakistan, for corruption). See also *Agriculture University*

educational programs and scholarship by holding conferences to spotlight bad practices<sup>73</sup> and by advocating institutional changes, such as the use of anonymous standardized testing to fight corruption in admissions decisions<sup>74</sup> and security measures to protect the integrity of examinations.<sup>75</sup> However, not all asserted “reforms” advance the cause of ethics in education. In Belarus, under expanded “anticorruption” legislation, “charges of corruption have been brought against people who voice views contrary to the regime’s,” including professors whose research “casts doubts on the official government statistics.”<sup>76</sup> Nor do all reforms last. In the Philippines, school ROTC officers, who had been relieved of duty when corruption was exposed by a campus paper, were “promptly reinstated” when a new commandant arrived.<sup>77</sup>

## B. The United States

In the United States, many educational institutions appear to operate in accord with high

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*Students to Observe Black Day During Governor Visit*, FRONTIER STAR (AsiaNet-Pak.), Oct. 9, 2006, 2006 WLNR 17521524 (discussing alleged corruption of a university a vice chancellor and provost).

<sup>73</sup> See, e.g., *9th Annual Fulbright Conference*, 11 THE FULBRIGHTER IN UKRAINE 1, 1 (Nov. 2006), available at <http://www.fulbright.org.ua/app/newsletter/11.pdf> (last visited Apr. 22, 2007) (describing a conference in Kiev on “Ethical Standards in Education and Scholarship”).

<sup>74</sup> See *F for Fairness*, *supra* note 50 (reporting that “an anonymous testing system, whereby every entrant is given a separate number, and tests are run in parallel on the same day nationwide . . . is widely applied in Turkey, Uzbekistan, Kazakhstan, Ukraine, and some other countries,” although “Tajikistan hasn’t tried it so far”); Kosc-Harmatiy, *supra* note 3 (indicating that conference participants in Ukraine proposed using standardized tests as a tool for fighting corruption); *Education Minister*, *supra* note 46 (discussing plans to introduce standardized testing in Russia).

<sup>75</sup> See Adenipekun, *supra* note 61 (reporting that Nigerian deputy rector recommended “[t]he use of security mail bags to convey question papers to examination centres”; “[d]aily swapping of supervisors to minimize . . . unwholesome familiarization of a supervisor in a particular examination centre”; “[p]roper scrutiny by examiners to detect scripts that are involved in cases of collusion or that are smuggled into the examination halls”; “[u]se of security personnel to man riot prone examination venues”; “[r]egular inspection of examination venues by roving examination functionaries or committees” and “multiple choice questions and short structured essay questions”).

<sup>76</sup> Rich, *supra* note 44.

<sup>77</sup> Opinion, *ROTC Reforms*, PHILIPPINE DAILY INQUIRER, Feb. 15, 2002, at 8, 2002 WLNR 7427526.



ethical principles and to be free of significant corruption. Yet, the news media frequently report blatantly wrongful conduct.<sup>78</sup> For example, in one case, a former college president pleaded guilty to embezzling \$3.4 million in student loans and Pell grants and using “the funds in part to cover . . . school debt and . . . operating costs.”<sup>79</sup> In another case, a community college lost its accreditation and was “effectively closed” when it was “unable to produce a budget due to lack of accounting systems,” and one of its trustees, who was accused of setting up a sham company to offer bogus classes, pled guilty to misappropriating more than \$1 million and was “sentenced to four years in prison, ordered to pay . . . restitution and agreed to never again hold public office in California.”<sup>80</sup> In another case that attracted national headlines, directors of financial aid at three major universities “held shares in a student loan company that each of the universities recommends to student borrowers, and in at least two cases profited handsomely.”<sup>81</sup> Other corrupt practices in American higher education include no-show jobs that deplete university budgets,<sup>82</sup> over-billing of the government,<sup>83</sup> prohibited payments to athletes,<sup>84</sup> obstruction of

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<sup>78</sup> See Kenneth Kesner, *Barron’s Character at Core of Race*, HUNTSVILLE TIMES (Huntsville, AL), Nov. 3, 2006, at 1B, 2006 WLNR 19860581 (referring to alleged corruption in an Alabama two-year community college system); Gloria Padilla, *After Brief Break, Dysfunction Returns to South San*, SAN ANTONIO EXPRESS-NEWS, Sept. 30, 2006, at 11B, 2006 WLNR 16967709 (referring to corruption that “rocked” a Texas community college district).

<sup>79</sup> Andrea Jones, *Ex-President of Morris Brown Gets Probation*, ATLANTA J.-CONST., Jan. 4, 2007, at A1, 2007 WLNR 133102.

<sup>80</sup> Marla Jo Fisher, *A College in Crisis: An Inability to Get the Books Right Plus Botched Management Sank Compton Community College*, COMMUNITY COLLEGE WEEK, July 17, 2006, at 6, 2006 WLNR 17112830.

<sup>81</sup> Jonathan D. Glater, *Student Loans Led to Benefits by College Aides*, N.Y. TIMES, April 5, 2007, at A1.

<sup>82</sup> See *School for Scandal*, N.Y. TIMES, Nov. 19, 2006, at 25, 2006 WLNR 20070789 (discussing charges that a New Jersey university created “no-show jobs for the politically connected”); *An Inside Look at the Week in New Jersey*, STAR-LEDGER (Newark N.J.), Sept. 24, 2006, at 3, 2006 WLNR 16570284 (discussing a federal monitor’s report charging that a state senator took a no-show job at a large university).

<sup>83</sup> See Nadya Labi, *Yale Under Scrutiny*, YALE ALUMNI MAG., Sept/Oct. 2006, at 21 (recalling that in 1996 several universities were penalized for Medicare fraud); William Lamb, *High-Ranking Official Loses Job at Troubled Medical School*, REC. N. N.J., Aug. 4, 2006, at A03, 2006 WLNR 13493004 (stating that a federal monitor issued a report finding that a medical school “overbilled Medicare by as much as \$35 million over five years and collected \$11.7 million to which it was not entitled from the state charity care system”); *State Looks for Reform Instead of Indictments*, REC. N. N.J., Dec. 30, 2005, at A12, 2005 WLNR 22319422 (discussing a

justice,<sup>85</sup> overpayments as a result of no-bid contracts,<sup>86</sup> improper gifts,<sup>87</sup> kickbacks related to student loans,<sup>88</sup> and, occasionally, even bribery of college or university officials.<sup>89</sup>

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medical university's double billing of Medicare and Medicaid).

<sup>84</sup> See Chris Dufresne, *SMU Has Yet to Recover From Severe NCAA Sanctions*, L.A. TIMES, Dec. 29, 2005, 2005 WLNR 22016937 (discussing a “payment scandal [that] was condoned and/or known about by members of the SMU athletic department and the school president”).

<sup>85</sup> See Opinion, *Petillo Must Go*, REC. N. N.J., Dec. 29, 2005, at L08, 2005 WLNR 22109951 (discussing accusations that university officials blocked a federal investigation into improper billing for medical services).

<sup>86</sup> See Editorial, *FSU Report Adds to DCF Woes*, SOUTH FLORIDA SUN-SENTINEL, July 24, 2004, at 16A, 2004 WLNR 20096238 (discussing favored vendors).

<sup>87</sup> See Jonathan D. Glater & Karen W. Arenson, *Lenders Sought Edge Against U.S. in Student Loans*, N.Y. TIMES, Apr. 15, 2007, at 1 (reporting that in “the absence of any [legal] crackdown on inducements, banks and other lenders showered universities with incentives to leave the [federal] direct lending program,” even though one major bank warned a large state university that “some services under discussion had ‘the potential to violate’ regulations against inducements”); Dillon, *supra* note 5, 106 (indicating that the attorney general of New York “accused [a private lender] of making payments to 60 colleges for loan volume”); Jonathan D. Glater, *Senate Inquiry in Loan Case is Studying Stock Transfer*, N.Y. TIMES, Apr. 11, 2007 (reporting that “[a]n Education Department official and financial aid directors at three universities received stock in a student loan company from the company’s current president in what may have been a violation of securities law” where “various documents . . . described the transfers as gifts”); Editorial, *The Widening College Loan Scandal*, N.Y. TIMES, Apr. 8, 2007 (reporting that universities too-frequently go along with the efforts of lenders to a “slice of the [student loan] business” whereby “[f]inancial aid officers are offered gifts and trips, and universities are offered hundreds of thousands of dollars in payments, if they place a company on their list of preferred lenders that most students use when looking for loans”); Johnson, *supra* note 14, at 4A (noting that the New York attorney general’s investigation of student loan kickbacks “found numerous arrangement that benefitted schools, financial-aid officers and lenders at the expense of students”).

<sup>88</sup> See Jonathan D. Glater, *Student Lender to Pay \$2.5 Million Settlement*, N.Y. TIMES, Apr. 16, 2007 (announcing a settlement by the New York attorney general with a company that had a practice of “‘revenue sharing,’ or paying back to colleges and universities a percentage of the total volume of private loans, those not guaranteed by the federal government, borrowed by their students”); Amit R. Paley, *Two Officials Suspended Over Student Aid Ties*, WASH. POST, Apr. 11, 2007, at A04 (reporting that a university assistant vice president for finance, was placed

Some observers of higher education also allege that wealthy Americans buy their children's way into the most prestigious colleges and universities by making lavish donations to those institutions, such as endowed scholarships, study centers, and buildings.<sup>90</sup> Such practices have a long history in the United States, and are sometimes found abroad, too. Lavatory facilities for the first women to enter the Yale School of Medicine in 1916 were funded by an alumnus whose daughter wanted to apply to the school, and who was soon thereafter admitted and graduated.<sup>91</sup> More recently, in Great Britain, officials at Oxford's Pembroke College reportedly said that a place in the entering class "might be found in exchange for a donation" of approximately 300,000 Pounds.<sup>92</sup>

Critics also allege, armed with abundant facts, that the growing influence of corporations that results from new financial arrangements between the business sector and higher education imperils "the ideal of disinterested inquiry."<sup>93</sup> For example, one university granted a billionaire

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"on administrative leave after New York state investigators disclosed" that he "agreed to market the lender to graduate schools in exchange for a cut of the profits"). *See also* Julie Bosman, *Colleges Relying on Lenders to Counsel Students*, N.Y. TIMES, Apr. 21, 2007 (reporting that a Maryland University, which allowed a lender to conduct financial-aid exit counseling, issued a press release announcing "the company's \$10,000 donation to a university scholarship fund").

<sup>89</sup> *Guilty Plea in Bribery Scheme*, BALT. SUN, Aug. 17, 2006, at 4B, 2006 WLNR 14238317 (reporting that a third man pled guilty to bribery after being charged with "participating in a six-year scheme that included providing home improvements, mobile phone service, golf vacations and cash" to a university construction manager who, "in exchange, steered projects" to the man's employer).

<sup>90</sup> *See, e.g.*, DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 12 (2006) (reporting that when a United States senator committed \$25 million to renovate a physics building at an Ivy League university, the president of the university advised her admissions committee that admitting the senator's son was a "high priority"), *reviewed in* Michael Wolff, *Show Them the Money*, N.Y. TIMES, Sept. 17, 2006, at 720, 2006 WLNR 16120705.

<sup>91</sup> *See* Judith Ann Schiff, *Yale's First Female Doctor*, YALE ALUMNI MAG., Sept./Oct. 2006, at 30.

<sup>92</sup> *See* Cottrell et al., *supra* note 36..

<sup>93</sup> *See* JENNIFER WASHBURN, *UNIVERSITY INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION* xvi (2005). *See* Lynnley Browning, *BMW's Custom-Made University*, N.Y. TIMES, Aug. 29, 2006, at C1, 2006 WLNR 14930516 (discussing an arrangement flowing from a \$10 million donation by an automaker to a university, which according to one expert, "looks like you've got a profit-making corporation that's calling the shots in a university setting").

“the right to screen all medical inventions at the university and pick the best ones to be developed, rather than leaving the decision to university professors and patent officers.”<sup>94</sup>

“Commercialization has grown because commercial opportunities have grown due to increased research spending by government and industry, tax breaks for industry research, and such measures as the 1980 Bayh-Dole Act facilitate patenting government-funded research findings.”<sup>95</sup> Not surprisingly, in some cases, purportedly neutral research funded in part by corporations is tainted by undisclosed conflicts of interest.<sup>96</sup>

Athletic scandals regularly mar the reputation of great colleges and universities.<sup>97</sup> In the worst cases, the conduct amounts to “essentially fraudulent academic programs whose only function is to keep athletes who could never survive in a real college classroom eligible to play [college sports].”<sup>98</sup>

Academic pampering of athletes takes many forms, including the simple failure to apply

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<sup>94</sup> John Russell, *\$100M? Purdue, For One, Will Take It*, INDIANAPOLIS STAR, Mar. 16, 2007.

<sup>95</sup> Harold Orlans, *Potpourri*, CHANGE, May 1, 2004, at 6, 2004 WLNR 12890617.

<sup>96</sup> See Jennifer Washburn, *The Best Minds Money Can Buy*, TULSA WORLD, July 30, 2006, at G3, 2006 WLNR 13194646 (explaining that “professors increasingly work ‘for hire’” and that as a result supposed objective research is tainted by undisclosed conflicts of interest relating to the producers of the products being evaluated).

<sup>97</sup> See, e.g., Rick Martinez, Opinion, *Poor Sports on Campus*, NEWS & OBSERVER (Raleigh NC), July 7, 2004, at A15, 2004 WLNR 17475016 (discussing college sports-related “lies and bad behaviors,” including a case where university football program “had freely used alcohol and sex to lure top-notch high school athletes”); Steve Wilstein, *College Sports Must Change to be Saved*, AUGUSTA CHRON., May 9, 2004, at C08, 2004 WLNR 1435245 (opining that “[academic] frauds, small and large, continued as usual this year. Coaches fired for various violations a year ago were rehired at different schools”); Jeff Jacobs, *Walls Go Up on Meyer’s Exit*, 8/21/03 THE HARTFORD COURANT (Conn.) C1, 2003 WLNR 15219355 (discussing athletic scandal at various universities); Noel C. Paul, *Baylor’s Ambition—And Response to Tragedy*, CHRISTIAN SCI. MONITOR, Aug. 29, 2003, at 3, 2003 WLNR 2281824 (discussing the use of “unbudgeted money to attract and retain [basketball] players”).

<sup>98</sup> Paul Campos, *The Hypocrisy of College Sports*, MOBILE REG. (AL), Sept. 4, 2003, at A13, 2003 WLNR 15767768 (opining that “[t]he NCAA Constitution is a stark example of the American belief that it’s possible to purify a fundamentally corrupt enterprise by passing a bunch of laws. . . [Trying] to regulate . . . [college sports] by legislating whether a recruit can be given a T-shirt is the equivalent of aiming a squirt gun at a forest fire”).

customary standards for admission<sup>99</sup> or class attendance. In one case, a coach was fired for teaching a sham course where all students received A's, including at least one athlete who never attended classes.<sup>100</sup> In addition, many traditional colleges and universities conduct programs to assist "barely literate high school athletes . . . [in laundering] their transcripts by taking pabulum courses and sometimes by taking no courses at all" before they "go on to big-time sports universities" for which they are academically unprepared.<sup>101</sup> These practices are pernicious because the vendors sell a dubious product to gullible or dishonest student-consumers and often place those recipients in a position to deceive others with regard to their qualifications. More specifically, the practices are corrupt because they seriously undermine the values of hard work and academic achievement for which true education stands.<sup>102</sup> Corrupt behavior relating to athletes affects other members of the student body. For example, when faced with evidence that college athletes had been permitted to take courses that required no classroom attendance, one major university promised prompt and decisive action, but pointed out that "the suspect courses were open not just to athletes, but to all students."<sup>103</sup> That caused the *New York Times* to comment that the "deeper and more alarming lesson is that the unethical behavior often associated with big-time college sports . . . easily seep[s] outward, undermining academic standards and corrupting behavior in the university as a whole."<sup>104</sup>

In the United States, as in other countries, there are continuing efforts to fight educational

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<sup>99</sup> See Ailene Voisin, *Can UCD Go Big and Stay Clean?*, SACRAMENTO BEE, Mar. 14, 2003, at C1, 2003 WLNR 15928165 (discussing admission of college athletes and academic fraud); Adrian Wojnarowski, *Rascals Put on Notice; College Fraud Under Attack*, REC. N. N.J., Mar. 16, 2003, at S, 2003 WLNR 13213989 (stating that at one university, where the average SAT score is 1390, the "average basketball player's [score] is 884"). Cf. Patrick Reddy, *Reforming College Sports: The Basketball Scandal at St. Bonaventure Is Just One Indication That Division I College Athletics Is out of Control and Desperately Needs to Be Reined In*, BUFF. NEWS, Mar. 16, 2003, at H1, 2003 WLNR 2214475 (reporting that "[only] a slight majority . . . of all male Division I athletes in all sports . . . finish college" and "[over] the last generation, NCAA men's [basketball] tournament winners such as the University of Nevada at Las Vegas, Kentucky, Louisville, Arizona and Michigan have had recruiting classes where not a single athlete has graduated").

<sup>100</sup> See Editorial, *Sports Cleanup Georgia's Decisive Action Could Be a Worthy Model*, CHARLOTTE OBSERVER (N.C.), Mar. 18, 2003, at 14A, 2003 WLNR 3063610.

<sup>101</sup> Editorial, *Fighting the 'Prep School' Scandal*, N.Y. TIMES, Dec. 17, 2006.

<sup>102</sup> See Editorial, *supra* note 9.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

corruption, although these efforts are sometimes not as strong as they should be.<sup>105</sup> State attorneys general regularly investigate<sup>106</sup> and prosecute<sup>107</sup> corrupt practices that harm students. One particularly hopeful sign in the battle for high ethical standards is the increased willingness of colleges and universities to self-impose penalties when academic fraud is discovered in athletic programs.<sup>108</sup> It is also encouraging that college athletic associations are cracking down on “fraudulent “prep schools” that inflate transcripts for high school athletes before passing them on to big-time college sports.”<sup>109</sup> However, there also reports that those who expose educational

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<sup>105</sup> See Amit R. Paley, *Federal Oversight of Student Loan Industry Is Lax, Cuomo Testifies*, WASH. POST, Apr. 26, 2007, at A12 (discussing charges that “The Department of Education has been asleep at the switch”); Assoc. Press, *Education Department Begins Student Loan Task Force*, WALL ST. J., Apr. 25, 2007 (quoting Luke Swartout, a public interest lobbyist, as stating that a Department of Education inquiry into corruption in the student loan industry “was doomed from the start. ‘There’s only so much real reform you can push if the industry that needs to be reformed has a veto’”).

<sup>106</sup> See Sam Dillon, *Student Lender Discloses Ties to Colleges That Included Gifts to Officials*, N.Y. TIMES, Apr. 21, 2007 (discussing a settlement agreement between the Nebraska attorney general and a major student lender); Assoc. Press, *California Seeks Details of Student Loan Deals*, L.A. TIMES, Apr. 18, 2007 (discussing an investigation by California’s attorney general in possible unlawful payments to colleges and universities and a conference call among 40 attorney general representatives to discuss related issues).

<sup>107</sup> See Sam Dillon, *New York Plans to Sue Drexel U. in Loans Inquiry*, N.Y. TIMES, Apr. 20, 2007 (discussing a planned deceptive trade practice suit by the New York attorney general against a Pennsylvania university that received or was owed a total of more than a quarter of a million dollars for designating a company as its “sole preferred private lender provider,” an allegedly “egregious” practice disadvantageous to students).

<sup>108</sup> See Joe Drape, *Facing N.C.A.A., The Best Defense is a Legal Team*, N.Y. TIMES, Mar. 4, 2007, at A1 (discussing a university which conducted its own investigation of payments to athletes and academic fraud and then “suggested remedies like self-imposed probation and a reduction in scholarships” to National Collegiate Athletic Association, which accepted most of the recommended sanctions and “agreed not to impose anything more stringent, like post-season bans”); Editorial, *supra* note 100 at 14A (discussing the basketball programs of four universities).

<sup>109</sup> Editorial, *Shutting Down Fake “Prep Schools,”* N.Y. TIMES, Mar. 10, 2007 (discussing “much-needed” actions against four nontraditional high schools” as part of a “transcript screening operation and . . . inspection process that has grown to include more than 200 nontraditional high schools”).

corruption are targeted for retaliation.<sup>110</sup>

### III. Basic Principles for Promoting Ethical Conduct

Basic principles for structuring a legal regime to fight corruption in education can be drawn from other fields of endeavor raising important issues relating to ethics in public life. In particular, the normative standards and practices which have emerged during the past forty years to promote ethics in the legal profession,<sup>111</sup> in the judiciary,<sup>112</sup> and in government<sup>113</sup> offer a useful starting point. A review of those sources suggests the following:

First, it is as important to fight the appearance of corruption as corruption itself, for perceived unfairness, dishonesty, or unequal treatment threatens public confidence in, and indeed the survival of, important institutions. To avoid bad appearances, public entities must operate transparently, as far as possible.<sup>114</sup>

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<sup>110</sup> Wright Thompson, *A Very Lonely Enterprise: Whistle-blowers That Reveal Wrongdoing in Athletic Departments Find They Lose Friends, Credibility, and Often Their Jobs*, TIMES-PICAYUNE, Mar. 31, 2002, at 1, 2002 WLNR 1408116 (discussing various institutions).

<sup>111</sup> See generally Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33 (2004-05) (hereinafter "*Clark's Legacy*") (discussing the "revolution" since 1970 which has "wholly reshaped the field of legal ethics," including substantive rules, education, and enforcement).

<sup>112</sup> See generally Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1014 (2002).

<sup>113</sup> See generally Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, & Public Policy*, 16 CORNELL J. L. & PUB. POL'Y 1, 14-18 (2007) (hereinafter "*Regulating Lobbyists*") (discussing principles that should govern the conduct of lobbyists); Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 727-50 (2006) (hereinafter "*Ethics in Government*") (discussing standards of conduct for current and former government officials and employees); Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y. L. SCH. L. REV. 177, 177-82 (1995) (hereinafter "*Myths*") (discussing five fundamental assumptions underlying government ethics laws); Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URB. L.J. 61, 61 (1993) (discussing the need of local government officials for guidance about what types of conduct are acceptable); Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. VA. L. REV. 281, 286 (1991/1992) (discussing public office as a "public trust").

<sup>114</sup> Cf. Editorial, *Congress and the Benefits of Sunshine*, N.Y. TIMES, Dec. 14, 2006 (praising a newly elected member of Congress who "has decided to post details of her work calendar on the Internet at the end of each day so constituents can tell what she is actually doing

Second, corruption should be fought with a combination of legal and ethical tools, including (a) prohibitions of clearly improper conduct,<sup>115</sup> (b) disclosure requirements that expose questionable practices to public scrutiny,<sup>116</sup> and (c) clear statements of aspirational principles.<sup>117</sup> None of these tools—prohibitions, disclosure requirements, or aspirational principles—is as effective when used without the others to fight corruption. For example, mandating disclosure of, but not prohibiting, certain bad practices, sometimes amounts to little more than requiring a person to post “price lists for the cost of doing business.”<sup>118</sup> This would be true, for example, if a

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for their money”).

<sup>115</sup> Cf. Johnson, *Regulating Lobbyists*, *supra* note 113, at 60 (arguing that in some contexts, “legal prohibitions that directly address bad practices offer a more efficient” means than disclosure requirements for resolving problems).

<sup>116</sup> Cf. Assoc. Press, *Head of Financial Aid Group Talks About Loan Scandal*, Apr. 12, 2007, available at [http://www.cnn.com/2007/EDUCATION/04/12/student.loan.probe.ap/index.html?eref=rss\\_education](http://www.cnn.com/2007/EDUCATION/04/12/student.loan.probe.ap/index.html?eref=rss_education) (last visited Apr. 13, 2007) (quoting Dallas Martin, president of the National Association of Student Financial Aid Administrators, as stating with respect to “the practice of lenders offering colleges a slice of the loan revenue they generate from their campuses,” that “revenue sharing arrangements often leave the appearance of a conflict of interest. . . . It’s very important that it be clearly disclosed”). But see Johnson, *Regulating Lobbyists*, *supra* note 113, at 19 (explaining that “[d]isclosure requirements, while conceptually appealing, are hard to implement effectively because it is difficult to determine what information should be reported, who should be obliged to report, and how that information can be made available to the public in a timely fashion. Some disclosure schemes are exceedingly complex and, as a result, lack the ethical clarity and efficacy that simpler rules might provide”).

<sup>117</sup> “When we memorialize our aspirations in . . . [an ethics] code . . . we publicly proclaim, not what we are, but what we want to be, what we insist on being.” Gerald S. Reamey, *Ethics Code Not Hollow Words*, SAN ANTONIO EXPRESS-NEWS, Feb. 4, 1998, at 5B. See also Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 25, 38-39 (2000) (opining that “when we articulate ethical obligations, we identify certain kinds of behavior as not merely desirable, but so important as to command unswerving compliance. Entirely aside from any issues of compliance or enforcement, such codified statements serve valuable educational and inspirational functions”).

<sup>118</sup> Editorial, *Now You See It, Now You Don’t*, N.Y. TIMES, Apr. 30, 2006 (discussing laws requiring disclosure of gifts and campaign contributions); Kathryn L. Plemmons, “*Lobbying Activities*” and *Presidential Pardons: Will Legislators’ Efforts to Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence?*, 18 B.Y.U. J. PUB. L. 131, 155 n.148 (2003) (quoting former White House counsel John Dean as stating that “disclosure laws have ‘legitimized a form of official corruption—sanitizing activities by publicizing them’”).



university administrator were required to disclose gifts from applicants or students, but not prohibited from accepting them. Similarly, prohibitions alone are less than optimal for sometimes they are too severe. In cases where conduct is not inevitably improper but raises ethical questions, disclosure may be sufficient to dispel any appearance of impropriety or to ensure neutral scrutiny of a transaction, relationship, or other facts. In addition, prohibitions and disclosure requirements are more effective when backed up by clear statements of aspirational principles.<sup>119</sup> Such principles guide the interpretation of rules of conduct, and encourage persons to surpass legal or ethical minimums. Yet, aspirational principles cannot be legally or ethically enforced, and by themselves may breed cynicism when conduct falls short of lofty goals and goes unpunished.<sup>120</sup>

Third, ethics codes, accompanied by ethics training<sup>121</sup> and enforcement mechanisms,<sup>122</sup> can perform an important role in fighting corruption in education. When codes of conduct identify impermissible practices, require disclosure of pertinent information, or articulate aspirational objectives, they reaffirm the moral basis of the educational process. If well-drafted, codes of conduct provide an important resource for ethics instruction. When framed in precise

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<sup>119</sup> For example, the Code of Judicial Conduct divides its substantive provisions into five canons. *See* CODE OF JUDICIAL CONDUCT (2000). Each canon begins with a short statement of aspirational principles, such as the admonition that a “judge shall uphold the integrity and independence of the judiciary” or a “judge shall so conduct the judge’s extra-judicial activities as to minimize the risk of conflict with judicial obligations.” *Id.* at Canons 1 & 4. Those aspirational principles are frequently taken into account by disciplinary authorities in determining whether more specific provisions of the code have been violated.

<sup>120</sup> *See* Mark W. Huddleston & Joseph C. Sands, *Enforcing Administrative Ethics*, 537 *Annals Am. Acad. Pol. & Soc. Sci.* 139, 143 (1995) (noting that cynicism flows from “codes that are clearly unenforceable, either because the standards are stated so vaguely or because no enforcement mechanism . . . is in place”); Timothy L. Fort, *Steps for Building an Ethics Program*, 1 *Hastings Bus. L.J.* 197, 205 (2005) (opining that “a code of conduct that is simply a paper program is ineffective and can breed cynicism”). *But see* Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 *N.C. L. REV.* 411, 445-46 (2005) (arguing that focusing the study of legal ethics on enforceable rule itself breeds cynicism).

<sup>121</sup> *Cf.* Johnson, *Ethics in Government*, *supra* note 113, at 763-67 (discussing ethics education in the government context).

<sup>122</sup> *Cf. id.* at 754-63 (discussing the enforcement of government ethics rules); Johnson, *Clark’s Legacy*, *supra* note 111, at 49-51 (discussing the enforcement of attorney ethics rules).

legal terms, codes also supply a standard by which to judge and punish errant practices.<sup>123</sup> Importantly, the attention focused on corrupt practices in the process of drafting or revising an ethics code often clarifies which types of conduct are or are not permissible.<sup>124</sup>

Fourth, it is important to recognize that corruption in education and many other contexts is not only a question of bad conduct, but of unequal treatment that calls into question the moral integrity of an enterprise.<sup>125</sup> For example, in the educational arena, when one applicant, student, or employee is treated differently than another in important respects without good reason, there is a risk of actual or perceived unfairness. The difference in treatment may be viewed as a variety of corruption. Consequently, fighting educational corruption entails not only rooting out bad practices, but putting in place measures that ensure a certain level of predictable and reasonably equal treatment and consumer protection<sup>126</sup> in admissions, grading, expulsion, and other important actions of educational institutions.

Fifth, it is not sufficient merely to state, however prominently, key ethical principles.<sup>127</sup> Rather, those principles ultimately must be enforceable, sometimes through internal disciplinary

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<sup>123</sup> Cf. Johnson, *supra* note 117, at 27 (discussing how ethical principles for lawyers are increasingly used as “hard-edged rules of law”).

<sup>124</sup> Cf. *id.* at 39-40 (explaining that codification and revision of ethics rules “invites re-examination of the choices of principle embodied in the code . . . and then informs future choices on whether prior decisions about principles should be reaffirmed or changed”).

<sup>125</sup> Cf. Catherine M. French, Note, *Protecting the “Right” to Choose of Women Who Are Incompetent: Ethical, Doctrinal, and Practical Arguments Against Fetal Representation*, 56 CASE W. RES. L. REV. 511, (2005) (opining that “integrity condemns special treatment unless it can be justified in principle. Institutional integrity . . . protects against partiality . . . [and] invidious institutional discrimination”). See also Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQUETTE L. REV. 903, 930 (2004) (arguing that “[e]quality is not a matter of identical treatment; rather, it is a matter of reasonably similar treatment”).

<sup>126</sup> See Johnson, *supra* note 117, at 31 (contending that “codes of ethics serve a consumer-protection function” because they “ensure that the ethical issues most likely to arise . . . have been anticipated and that standards for performance have been articulated”).

<sup>127</sup> This was one of the failings of the French Revolution. The leaders of the revolution directed that the principles of the Declaration of the Rights of Man and Citizens be written on tablets and erected in public places, but failed to create an independent judiciary to enforce the legal principles of the new regime, which sought to ensure liberty, equality, and fraternity. See Vincent Robert Johnson, *The French Declaration of the Rights of Man and Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 BOSTON COLL. INT’L & COMP. L. REV. 1, 16-17 (1990).

processes within educational institutions (such as honor code hearings into plagiarism charges)<sup>128</sup> and sometimes through the courts (such as civil or criminal actions to redress misappropriation of funds).<sup>129</sup> Enforcement must be regular, not selective; independent, not manipulated; and adequately resourced, not underfunded. Procedures must encourage the reporting of alleged wrongdoing, and assure its investigation, while at the same time discouraging the filing of frivolous charges.

Sixth, ethical leadership is essential.<sup>130</sup> Those in top positions must act in a manner that is consistently fair and honest and avoids any reasonable suspicion of corruption. More specifically, leaders must set an example, punish corrupt practices, support those who seek to act ethically in the face of countervailing pressures, and urge compliance with legal and ethical principles. For example, when the government investigates a university for allegedly fraudulent conduct, it is important for the university president to write a letter to the faculty and staff “urging everyone in the strongest possible terms to provide complete and truthful replies to questions” about those matters.<sup>131</sup> In the college and university context, ethical leadership sometimes means that administrators must resist market pressures that trench upon good educational practices. Although students in a sense are “customers,”<sup>132</sup> they are not “always right.” Thus, thoughtful observers have decried the willingness of colleges and universities, focused on the economic bottom line, to make excuses for student plagiarism and other bad

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<sup>128</sup> See generally Part IV-B-2.

<sup>129</sup> See generally Part IV-C.

<sup>130</sup> Cf. Douglas Lederman, *College Presidents Learn It's Hard to Keep Sports Pure*, USA TODAY, Jan. 14, 2004, at 01A, 2004 WLNR 6232944 (quoting NCAA President Myles Brand as saying that college and university “presidents are key to keeping sports programs within the academic mission of the university”); Editorial, *supra* note 108 (opining that “[t]he quest for integrity in college sports will fail unless university presidents insist on it and coaches see it as a condition of their employment”).

<sup>131</sup> Labi, *supra* note 83 (quoting a letter from Yale University president Richard Levin to faculty and staff after it was learned that the university was being investigated by three federal entities and had been served subpoenas relating to 47 grants). See also Associated Press, *UT System Schools Ordered to Stop Posting Preferred Lender Lists*, HOUS. CHRONICLE, Apr. 17, 2007, available at <http://www.chron.com/disp/story.mpl/ap/tx/4723415.html> (indicating that when questions were raised about financial aid conflicts of interest, the University of Texas told its 15 campuses to “immediately cease and desist” the allegedly objectionable practices and “to report any benefits . . . [they had] accepted from lending firms”).

<sup>132</sup> But see DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 123 (2003) (arguing that “[c]ustomers want to have their preferences *satisfied*, but students come to a university to have their preferences *formed*”).

practices.<sup>133</sup> Good education requires a firm commitment to high moral principles even when that may place an academic institution at a disadvantage in the market place. Because ethical leadership plays a vital role in fighting corruption, it is important that those in high offices be held accountable for their misconduct.<sup>134</sup> This is especially true at the college and university level because higher education institutions play a key role in preparing graduates to fight corruption in the public sector.<sup>135</sup>

Seventh, it is important to differentiate ethical principles from budgetary practices. As a matter of principle, the total elimination of corruption is an appropriate goal—perhaps *the only* appropriate goal. However, insofar as expenditures on constructing and enforcing an ethics regime, a goal of zero corruption is no more realistic in academia than in other contexts.<sup>136</sup> At a certain point, the rules and practices that must be implemented to further fight bad practices are so rigid, burdensome, and expensive that the benefits they produce are outweighed by the costs

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<sup>133</sup> See Clive Bloom & John Higgins, *You, Sir, are a Cad, a Cheat and a Bounder*, TIMES HIGHER EDUC. SUPP., Sept. 15, 2006, at 16, 2006 WLNR 16097811 (arguing that “[e]veryone in higher education has a story about the lame excuse coming down from above as to why little Johnny should be allowed yet another resit, although he has cheated year on year, and why the vice-chancellor’s directive on not losing a single student should be the watchword of the exams board. . . . For many, it’s all a part of the new educational culture in which the student is addressed as a customer, and the customer is always right”).

<sup>134</sup> Cf. Lederman, *supra* note 130 (reporting that a university president “was forced to resign . . . after conceding he personally had admitted a junior-college basketball transfer who didn’t meet the school’s, or the NCAA’s, eligibility requirements”).

<sup>135</sup> Cf. Kevin Huang, *Chen Protest Leader Plans Campus Visits*, S. CHINA MORNING POST, Oct. 23, 2006, at 4, 2006 WLNR 18346824 (quoting a leader of Taiwan’s anti-graft movement as stating that he would “first go to universities” in his campaign to depose an official “by allegations of involvement in corruption scandals” because “[universities] are an important place for nurturing people’s sense of civic duty”). See also *College Cleanup*, *supra* note 45 (quoting the author of a study about corruption in Russia universities as stating, “[after] enrolling in college through bribes, young people get used to the fact that everything can be obtained for an extra fee. With such silent consent, corruption becomes a common thing”).

<sup>136</sup> See ROSE-ACKERMAN, *supra* note 12 at 4 (stating that in the governmental context “[t]he goal is not the elimination of corruption but an improvement in the overall efficiency, fairness, and legitimacy of the state”); MELANIE MANION, CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG 4 (2004) (stating that “the optimal level of corruption [is not ] zero--not only is corruption control costly, but the ‘pursuit of absolute integrity’ is quite dysfunctional, distorting the purpose of government and its agencies”).

they impose.<sup>137</sup> “Once one takes the costs of prevention into account, the level of deterrence expenditures should be set where the marginal benefits equal the marginal costs.”<sup>138</sup>

Consequently, an ethics regime should seek to eliminate corruption in education as far as possible, mindful of the fact that perfect enforcement of ethical principles should not be the objective.<sup>139</sup> This course also offers practical advantages beyond optimizing institutional expenditures on ethics. Rules that are too stringent may have the opposite effect by inducing violations because compliance is too costly.<sup>140</sup>

Finally, alternative dispute resolution (ADR) may have a role to play in ethics enforcement, as it does in many other contexts. For example, in the American civil litigation system, most cases are resolved not by trial and appeal, but by negotiation, arbitration, and mediation. This reality does not mean that civil-liability rules and related legal procedures are a sham. Rather ADR mechanisms recognize that sometimes public and private interests are better served by less formal dispute-resolution processes. Of course, there is a critical difference between efficiently and informally resolving ethics charges, on the one hand, and sweeping unethical conduct “under the rug,” on the other hand. In some cases, informal resolution is not appropriate. But in other cases, the contrary is true. Thus, it is not surprising that some higher education institutions permit a dean to exercise discretion by resolving a complaint of unethical

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<sup>137</sup> Cf. Johnson, *supra* note 32, at 756 (stating that “ethical conduct is not a free commodity; it comes at a cost. Every call for higher ethical standards diverts attention from other social problems. Every investigation of a government official entails expenses, not the least of which is distraction of the accused and others from the performance of official duties. Every dollar spent on ethics enforcement is money diverted from other worthy programs”).

<sup>138</sup> See ROSE-ACKERMAN, *supra* note 12, at 52.

<sup>139</sup> See Johnson, *supra* note 32, at 757-58 (stating that, with respect to ethics in government, the task is “to separate the types of favors and relationships that corrupt government and abuse power from those that do nothing more than smooth the rough edges of an imperfect legal system. It is not easy to draw the line separating practices which give government a human face and make its actions efficient from other forms of conduct which unfairly handicap innocent persons. The challenge is to decide how much ethics in government is enough, but not too much”).

<sup>140</sup> Cf. Goh, *supra* note 31 (stating that prior to 1978 in China, “the centrally planned economy’s rigid price controls and highly centralized administrative system led to inflexibility, wastage and a shortage of goods and services. This bred a form of corruption in which the well connected used *guanxi* (connections) and *zouhoumen* (back door practices) to secure things such as soft seats on trains, better housing, [and] university places”).

conduct informally,<sup>141</sup> or that some cases of alleged attorney misconduct are resolved by streamlined procedures and imposition of a “private” reprimand, rather than by a plenary trial and appeal process and public sanction.<sup>142</sup> Few ethics regimes could function well if full compliance with elaborate procedures were insisted upon in every case.

#### IV. Best Practices in Higher Education

##### A. Job Security and Benefits

Within an educational enterprise, persons who lack security of position or benefits are more susceptible than others to pressure by their superiors.<sup>143</sup> If managers are corrupt, such subordinates may lack the ability to resist demands that they engage in illegal conduct or accord unqualified persons preferential treatment.<sup>144</sup> Vulnerable subordinates may also be unwilling to expose corruption within their institutions for fear of retaliation. Consequently, reasonable provisions for job security, like the tenure system common in most American universities<sup>145</sup> and comparable regimes,<sup>146</sup> can play an important role in fighting corrupt practices.

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<sup>141</sup> See, e.g., ST. MARY’S UNIVERSITY SCHOOL OF LAW, STUDENT HANDBOOK 52 (2006) (hereinafter “ST. MARY’S STUDENT HANDBOOK”) (providing that “[in] appropriate cases, the Dean may invite the accused student to discuss the allegations informally with a view to summary disposition of the matter” without adherence to the usual procedures).

<sup>142</sup> See Johnson & Lovorn, *supra* note 8, at 532 & n.9 (discussing private reprimands).

<sup>143</sup> See Antonovych & Merezko, *supra* note 11, at 3 (stating, with reference to Ukraine, that “when a professor depends on the Rector’s will, he becomes an easy prey to this corrupt system, and, against his/her own will, is forced either to play according to the rules thrust upon him/her by the administration, or, sooner or later, lose his/her job”).

<sup>144</sup> See *id.*, at 3 (opining that, in Ukraine, “[unfortunately], the faculty, too, often lack courage to resist corruption; they are compelled to act as conformists because . . . they might be concerned about the chances of their own children entering the same university if they act in any way to resist corruption”).

<sup>145</sup> See generally Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U. L. Rev. 67, 69 (2006) (stating that “[tenure] protects a faculty member by providing academic freedom, job security, and due process prior to dismissal”). Cf. Editorial, *Protect the Integrity of Tenure*, DENVER POST, Mar. 30, 32007 (opining that “the basic tenets of tenure must be protected because the benefits of academic freedom are so profound).

<sup>146</sup> ABA Standard 405(c) provides that “[a] law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure.” AMERICAN BAR ASS’N STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 405(c) (2006-07) [hereinafter

Many types of educational corruption, such as embezzlement, misuse of funds, misappropriation of property, and bribery, are rooted in economic needs and wants. Workers who are underpaid may be tempted to engage in these types of improper conduct to make up the deficiencies in their salaries or wages.<sup>147</sup> In addition, ill-compensated employees are likely to be unmotivated in their performance of duties, and persons who interact with the educational institution through those workers may be willing to propose and pay bribes or confer other pecuniary benefits in order to receive more efficient service or preferential treatment.<sup>148</sup> Moreover, adequate pay plays an important role in the efficacy of sanctions, for unless teachers and others are adequately paid, the threat of losing one's job as a result of corruption may inflict little pain, and may therefore not deter bad practices.<sup>149</sup> Consequently, under-compensation produces multiple disincentives which increase the risk of corruption. While no one would suggest that ethical conduct can be expected only from the economically comfortable, or that high pay can eliminate the risk of corruption,<sup>150</sup> adequate compensation of those who work in education can help to eliminate corrupt practices.<sup>151</sup> This is why conventional civil service systems pay career officials appropriate salaries.<sup>152</sup>

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ABA Standards], *available at* [http:// www.abanet.org/legaled/standards/chapter4.html](http://www.abanet.org/legaled/standards/chapter4.html) (last visited May 1, 2007). ABA Interpretation 405-6 provides that “[a] form of security of position reasonably similar to tenure includes . . . a program of renewable long-term contracts.” *Id.*

<sup>147</sup> Kosc-Harmatiy, *supra* note 3 (stating that conference participants partially attributed “bad behavior,” such as “taking bribes,” in post-Soviet universities to “limited financial resources given to faculty as salary and for research opportunities”).

<sup>148</sup> *See* ROSE-ACKERMAN, *supra* note 12, at 25 (asserting that in a government “administered by underpaid and unmotivated public officials, the incentives to pay bribes are high, and the benefits seem obvious”).

<sup>149</sup> *Cf. id.*, at 78 (stating with respect to government corruption that “[i]f civil service employment is well paid, corrupt officials suffer real pain if they are caught and forced out”).

<sup>150</sup> *See id.*, at 78 (stating that “[h]igh pay may simply increase the bribe an official demands in order to overcome the risks of losing what is now a desirable job. Officials may go from being “lean and mean” to being “fat and mean”).

<sup>151</sup> *See Officials Should Spearhead Anti-corruption Combat - US Envoy*, ASSA-IRADA NEWSFEED, Dec. 6, 2006, 2006 WLNR 21074498 (stating that in Azerbaijani the “high level of corruption in higher schools stems from the low salaries of teachers”).

<sup>152</sup> *Cf. ROSE-ACKERMAN, supra* note 12, at 75 (stating the point, but noting that effectively fighting corruption requires additional steps).

## B. Codes of Conduct

At every educational institution, there should be codes of conduct that govern the behavior of students, faculty members, administrators, and other college or university representatives.<sup>153</sup> However, educators in some countries candidly admit that their institutions are not ready to take the step of adopting and enforcing ethics rules.<sup>154</sup>

Codes of conduct (sometimes called “honor codes” or “codes of ethics”) can be traced back in the United States to the 18th Century, when students at the College of William and Mary introduced an honor code which “addressed lying, cheating and stealing.”<sup>155</sup> A code of conduct should clearly identify the types of conduct proscribed, the disclosures required, the procedures observed to investigate complaints, and the sanctions used to punish violations. Many ethics regimes require complaints of alleged violations to be sworn.<sup>156</sup> However, one Texas community college created a “ethics hotline” to gather anonymous tips that was later hailed as an important step in changing the culture of corruption which had previously resulted in the indictment of three board members.<sup>157</sup>

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<sup>153</sup> See Steven K. Berenson, *What Should Law School Student Conduct Codes Do?*, 38 AKRON L. REV. 803, 825-26 (2005) (discussing law school codes of conduct in detail, particularly their regulatory functions); Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-first Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004) (presenting model code language); Thomas R. Baker, *Construing the Scope of Student Conduct Codes: Recent Federal Rulings Suggest Heightened Court Scrutiny Ahead*, 174 ED. LAW REP. 555 (2003); Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 B.Y.U. Educ. & L.J. 1 (2003); Saraah Ann Bassler, *Public Access to Law School Honor Code Proceedings*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 207 (2001).

<sup>154</sup> Kosc-Harmatiy, *supra* note 3 (indicating that “Ukrainian [conference] participants generally agreed that their institutions were not prepared for honor codes and were reluctant to discuss them”).

<sup>155</sup> *Id.*

<sup>156</sup> See, e.g., Johnson, *Ethics in Government*, *supra* note 113, at 762 n. 216 (discussing the use of sworn complaints in the government ethics field).

<sup>157</sup> See Editorial, *ACCD Ethics Hotline Changing the Culture*, SAN ANTONIO EXPRESS-NEWS, Mar. 12, 2007 (stating that while “many questioned the \$165,300-a-year cost, . . . the hotline appears to be doing its job”). See also Melissa Ludwig, *Trustees Set Appeal in April for Accused St. Philip’s Dean*, SAN ANTONIO EXPRESS-NEWS, Mar. 14, 2007, at 3B (discussing a hotline “tip” that generated an internal investigation). See also Carl Oxholm III, *Sarbanes-Oxley in Higher Education: Bringing Corporate America’s “Best Practices” to Academia*, 31 J.C. &



Ethics codes should be clearly written. Whenever possible, they “should contain bright-line rules and never three-armed lawyer gobbledygook—that is, on the one hand this, on . . . the other hand that, and on the third hand something else.”<sup>158</sup> Codes of conduct must afford rudimentary due process by providing fair notice of what is prohibited or required and specifying reasonable procedures for resolving alleged violations. In particular, institutional codes of conduct should define what level of culpability gives rise to liability (e.g., intent, recklessness, negligence, or strict liability), who bears the burden of proof (presumably the institution), and how convincingly guilt must be established before a sanction may be imposed (i.e., whether a violation must be proved by a “preponderance” of the evidence,<sup>159</sup> by “clear and convincing” evidence,<sup>160</sup> or “beyond a reasonable doubt”<sup>161</sup>). Under the terms of the code, Investigative and adjudicative personnel should be sufficiently independent<sup>162</sup> and immune from retribution as to allow the process to enjoy the confidence of relevant stakeholders. Normally, an initial determination by a factfinding body regarding the merits a complaint should be subject to some form of appellate review that ensures that required procedures were followed and normative standards were correctly interpreted and applied.

In drafting the procedural provisions of an ethics code, a careful decision must be made as to whether there should be a rule prohibiting *ex parte* communications. In the United States, the rule against *ex parte* communications plays a vital role in the adversarial court system.<sup>163</sup> The

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U.L. 351, 361-62 (2005) (discussing hotlines).

<sup>158</sup> See Davies, *Myths*, *supra* note 113, at 178-79.

<sup>159</sup> “This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.” BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “preponderance of the evidence”).

<sup>160</sup> Clear and convincing evidence is evidence “indicating that the thing to be proved is highly probable or reasonably certain . . . This is a greater burden than preponderance of the evidence, . . . but less than evidence beyond a reasonable doubt.” *Id.* (defining “evidence”).

<sup>161</sup> Reasonable doubt is the “doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that there is a real possibility that a defendant is not guilty.” *Id.* (defining “reasonable doubt”).

<sup>162</sup> Cf. Editorial, *Beware of Lapsing Ethicists*, N.Y. TIMES, Apr. 14, 2007 (opining that the House of Representatives could enhance confidence in government by creating a “credible integrity office . . . having impartial and vigilant professional investigators who were authorized to screen complaints and recommend action”).

<sup>163</sup> “Neutral decisionmakers who resolve disputes based on the law and facts presented at trial rather than on extrajudicial influences are central to the concept of an adversarial system of justice.” NATHAN M. CRYSTAL. PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND

rule prohibits one side of a case (or persons outside the litigation) from communicating secretly with a judge about the merits of the dispute.<sup>164</sup> This restriction ensures that each party has the opportunity to learn what another party or third person says and to challenge those statements either through cross-examination, opposing testimony, or argument.<sup>165</sup> Interestingly, many American educational institutions have disciplinary procedures which do not prohibit *ex parte* communications. Yet, it is easy to see how secret communications can prejudice decision makers and taint the fairness of an adjudicatory process. University procedures could often be improved by the adoption of a rule against *ex parte* statements. In American educational institutions, this drafting choice would not be surprising, for it would be consistent with fundamental tenets of the American justice system. However, it is less clear whether the same type of rule would be as appropriate in other countries that have an “inquisitorial,” rather than “adversarial,” justice system.<sup>166</sup> At a minimum, the issue should be addressed, for disciplinary fairness in any legal

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THE PROFESSION 166 (3d ed. 2004) (citing 2 HAZARD AND HODES, THE LAW OF LAWYERING §31.5, at 6-7).

<sup>164</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.5 (2002) (providing that “[a] lawyer shall not . . . communicate *ex parte* with . . . [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order”); CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1999) (providing that “A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that: (a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond. (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities or with other judges. (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. (e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so”).

<sup>165</sup> See Johnson, *supra* note 112, at 1014-17 (discussing *ex parte* communications).

<sup>166</sup> Cf. McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991) (opining that “[w]hat makes a system adversarial rather than inquisitorial is not the presence of counsel . . . but rather, the presence of a judge who does not (as the inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”).

system requires that decisions not be based on secret information or irrelevant considerations. It is essential to minimize the distorting influence of such factors.

It is also important to consider under what circumstances a potential decision maker must step aside from the decision making process because of bias or prejudice relating to the complainant or the accused. Most American educational institutions operate, quite appropriately, with a level of formality considerably less demanding than the procedures followed in a court of law. It would be unreasonable to expect colleges and universities to adopt the same rules on recusal that are applicable in civil and criminal court proceedings. In the United States, that complex matrix of rules requires a judge to step aside whenever his or her impartiality “might reasonably be questioned.”<sup>167</sup> Those rules include very specific provisions dealing with a multitude of circumstances where recusal may be required.<sup>168</sup> Yet, even if educational institutions operate with less formality than courts, recusal rules of some form should still be followed. For example, misconduct charges against a student or faculty member should be decided by someone who is not closely related to the complainant or the accused, and probably by someone who was not involved in the underlying facts. The recusal provisions of the Code of Judicial Conduct and related precedent offer a useful checklist for thinking about situations where recusal might be appropriate in academia.

Educational institution codes of conduct need not be all encompassing for they operate against a backdrop of other control mechanisms, such as laws imposing criminal and tort liability

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<sup>167</sup> See CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1999).

<sup>168</sup> See *id.* at Canon 3(E)(1) (1999) (stating that disqualification is required where “(a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it; (c) the judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, parent or child wherever residing, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding; (d) the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; (iv) is to the judge’s knowledge likely to be a material witness in the proceeding; (e) the judge knows or learns by means of a timely motion that a party or a party’s lawyer has within the previous . . . [certain defined] contributions to the judge’s campaign”).

and employment personnel rules.<sup>169</sup> Nevertheless, it is essential that student and faculty honor codes address important topics which are otherwise unregulated. Some college or university ethics codes apply to students, faculty members, and administrative personnel alike.<sup>170</sup> However, the conduct issues relating to students (e.g., for disruptive partying or cheating on exams) are different than the issues that arise with respect to employees (e.g., improper economic benefit from official duties or conflicting outside employment). This article will focus separately on ethics codes for students<sup>171</sup> and faculty members.<sup>172</sup> However, many of the faculty code of conduct recommendations are equally be applicable to the formulation of standards of conduct for college and university administrators, staff members, and trustees. For example, there is little reason to exempt members of these latter groups from a rule, applicable to faculty members, prohibiting the misuse of official power to secure economic benefits for close family members.<sup>173</sup>

## 1. Student Codes

The most critical provisions in a student honor code are those which define what constitutes academic misconduct, including, for example, cheating on examinations or using

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<sup>169</sup> Inevitably, there will be a certain degree of overlap between these various normative measures. For example, some types of conduct—such as one student’s theft of the property of another—may be a crime under state law and disciplinary misconduct under a university honor code. In some cases, it makes sense for disciplinary procedures within an educational institution to be deferred pending the conclusion of criminal proceedings. In other cases, an ethics code may provide that proof of serious criminal conduct in a court of law constitutes the type of misconduct which justifies imposition of an additional sanction (such as suspension or expulsion) by an educational institution. An analogy may be drawn to ethics codes governing lawyers, which frequently state that it is misconduct, punishable by a range of sanctions such as reprimand, suspension, or disbarment, for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” MODEL RULES OF PROF’L CONDUCT R. 8.4(b) (2002).

<sup>170</sup> *See, e.g.*, HOWARD UNIVERSITY, CODE OF ETHICS AND CONDUCT art. II (Aug. 1998), available at <http://www.howard.edu/policy/codeofethics.pdf> (last visited Apr. 13, 2007) (hereinafter HOWARD UNIV. CODE) (stating obligations that apply to “University Community,” which is defined as “members of the Board of Trustees, all students, Faculty, and administrative personnel”).

<sup>171</sup> *See* Part IV-B-1.

<sup>172</sup> *See* Part IV-B-2.

<sup>173</sup> *See* Part IV-B-2-a.

prohibited sources when writing research papers. Such infractions<sup>174</sup> are clearly harmful, for the “cheater is a free rider and therefore gets higher marks than he or she deserves,” while the “efficiency of the country’s educational system is reduced, because cheating distorts competition, diminishes the student’s incentive to study, and leads to inaccurate evaluation of the student’s abilities.”<sup>175</sup> However, academic misconduct is frequently neither described nor proscribed by normative standards other than a student ethics code. While academic misconduct may take many forms, the connecting thread is that such actions give offenders an unfair advantage over other students in obtaining academic opportunities or fulfilling academic requirements.

It is important for “academic misconduct” to be defined broadly by a student ethics code because the varieties of such malfeasance multiply as technology and business practices change. Not long ago, no one would have thought of text messaging or other cell phone use during an examination as a form of potential academic misconduct, but they certainly are today.<sup>176</sup> Yet, defining academic misconduct only in broad terms—for example, as all acts or omissions that confer on one student an “unfair advantage” over others in satisfying degree requirements—would be undesirably vague. A good ethics code serves not only as a basis for enforcement, but as a tool for education. As far as possible, the definition of academic misconduct should place students clearly on notice of what is forbidden. Consequently, it is desirable in writing a student code of conduct to couple a general rule against academic misconduct with specific examples, presumably in an “including, but not limited to” drafting format. This type of rule may afford a college or university flexibility in adapting the prohibition to new technologies and other developments while nevertheless offering concrete examples of forbidden conduct that can be useful in educating students about their obligations. An example is set forth in the margin.<sup>177</sup>

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<sup>174</sup> See Stanley B. Chambers, Jr., *34 Duke Students Accused of Cheating*, NEWS & OBSERVER, Apr. 28, 2007, <http://www.newsobserver.com/1366/story/568763.html> (last visited May 1, 2007) (discussing the “largest cheating scandal” in the history of a business school).

<sup>175</sup> See, e.g., Jan R. Magnus, Victor Polterovich, Dmitri L. Danilov, & Alexi V. Savvateec, *Tolerance of Cheating: An Analysis Across Countries*, J. ECON. EDUC., Mar. 22, 2002, at 2125, 2002 WLNR 11015586.

<sup>176</sup> See Judy Keen, *Students Get the Message: Leave Phones at Home*, USA TODAY, Jan. 26, 2006, at 3A (reporting that “[s]chools across the USA are cracking down on students whose cellphones . . . make it easier to cheat” via text messaging and “taking photos of tests”).

<sup>177</sup> Section 2.02 of *The Student Handbook* of St. Mary’s University School of Law provides in relevant part:

(a) An academic matter is any activity which may offer or in any way contribute to the satisfaction of requirements for graduation. Academic matters include, but are not limited to, examinations, research, or other class assignments.

(b) It is a violation of the Code for any student to engage in conduct which tends to gain that student or another an unfair advantage in an academic matter. The following

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applications of this rule . . . are illustrative, not exhaustive.

1. In an examination, a student shall follow all instructions concerning its administration, shall not use any materials other than those specifically authorized by the professor, and shall not converse or communicate with any person(s) other than the person(s) administering the exam.

2. In research or other writing assignments, a student shall not use materials specifically forbidden by the instructor and must fairly identify passages or ideas from the work of others. The student shall make attribution by proper use of quotation marks, citations, or other forms of reference.

3. A student shall not submit or have submitted as his or her own, the work of another. Nor, except by permission of the instructor after full disclosure, shall a student submit in fulfillment of an assignment any work prepared, used, or submitted in another course or for a law journal, clinic, law firm, government agency, or any other organization.

4. A student shall not hide, mutilate, deface, or remove, without permission, library materials or the materials of another student.

5. A student shall not breach the security maintained for the preparation and storage of exam materials. . . .

6. A student shall not discuss an examination he or she has already taken with a student scheduled to take a deferred examination in the same course or with any other person under circumstances likely to endanger the security of examination questions.

7. During the course of and prior to the completion of any examination, research, or other assignment, a student shall not provide to, compare with, or obtain from another student any answer or part of an answer, unless authorized by the professor.

The St. Mary's University School of Law Code of Student Conduct also prohibits disciplinary misconduct, which is defined in Section 2.03 as follows:

(a) A disciplinary matter is any activity bearing upon a student's fitness for the study and practice of law, other than an academic matter.

(b) It is a violation of the Code for any student to engage in disciplinary misconduct. Disciplinary misconduct is behavior which clearly indicates an inability or unwillingness to conform to minimum ethical standards for the practice of law. The following applications of this rule . . . are illustrative, not exhaustive.

1. A student shall not commit an act prohibited by the Model Rules of Professional Conduct promulgated by the American Bar Association or by the Texas Disciplinary Rules of Professional Conduct.

2. A student shall not commit an act amounting to a felony or a misdemeanor involving moral turpitude under the laws of the United States or of the State of Texas against the University, any employee or student of the University, or any immediate family member of any employee or student of the

Some honor codes impose a duty on students to report knowledge of a violation of the code by others. The feasibility of such a provision presumably varies greatly depending on the country, for in many countries “attitudes toward cheating [differ] considerably.”<sup>178</sup>

## 2. Faculty Codes

In the United States, various codifications address the ethical obligations of faculty members and thereby help to fight corruption in education. There are at least three basic varieties of faculty codes. Some ethics codes are promulgated by the professional organizations to which faculty members or educational institutions belong. Other rules are written at the college and university level. Still other codified standards are imposed by law, usually as a result of state legislative action.

A typical example of a professional organization code establishing standards of conduct for certain higher education faculty members is the *Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities* of the Association

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University.

3. A violation occurs if one is found guilty of a felony or of a misdemeanor involving moral turpitude under the laws of the United States or of any state. The J.D. degree of a student will be automatically withheld if charges brought by federal or state authorities are pending against that student for any felony or misdemeanor involving moral turpitude, until such charges are disposed of by a finding of not guilty or by dismissal.

4. A student shall not cause serious disruption of the Law School or of the University within the meaning of Tex. Educ. Code Ann. . . . [§ 37.123] or otherwise.

5. A student shall not fail to comply with the terms of any sanction imposed in accordance with this Code.

6. A student shall not cause false, material information to be furnished to a University professor, administrator, staff member, organization, tribunal, or duly appointed investigator with intent to deceive.

7. A student shall not refuse to cooperate with the Court of Student Conduct, with the Dean, or with the Faculty Committee for Student Appeals in the investigation or hearing of charges.

8. A student shall not submit false or misleading information on resumes, in job applications, or in employment interviews.

ST. MARY’S STUDENT HANDBOOK, *supra* note 141.

<sup>178</sup> See Magnus, *supra* note 175 (discussing the United States, the Netherlands, Israel, and Russia).

of American Law Schools.<sup>179</sup> This document defines the responsibilities of law professors as scholars, as well as their duties to students, colleagues, their law school and university, the bar, and the general public. However, unless these kinds of statements of good practice are adopted by a particular educational institution and then coupled with enforcement mechanisms, the norms remain purely aspirational. To the extent that violations are not penalized by imposition of sanctions, or even subject to reliable procedures for investigating complaints and making findings of fact, these principles may be disregarded by those whose conduct is most in need of ethical restriction.

Other ethics codes, or at least selected ethics provisions, are formulated and enacted at the institutional level.<sup>180</sup> These standards may be directly connected to disciplinary or termination processes,<sup>181</sup> for example, by inclusion in a college or university faculty handbook. Nevertheless such norms seem to play a modest role in fighting educational corruption, perhaps because colleges and universities devote too few resources to ethics training and enforcement. Disappointingly, college and university faculty ethics rules often speak in terms that lack the intellectual rigor that scholars customarily devote to other subjects.<sup>182</sup> A clear exception to this lack of rigor concerns romantic and sexual relationships between teachers and students, with respect to which rules are often carefully drafted.<sup>183</sup> In general, institutional faculty ethics codes,

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<sup>179</sup> Association of American Law Schools, *Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities* (May 2003), available at [http://www.aals.org/about\\_handbook\\_sgp.php](http://www.aals.org/about_handbook_sgp.php) (hereinafter “*AALS Statement of Good Practices*”).

<sup>180</sup> See, e.g., HOWARD, UNIV. CODE, *supra* note 170; ST. MARY’S UNIVERSITY EMPLOYEE CODE OF BUSINESS CONDUCT (Sept., 27, 2005) (hereinafter “ST. MARY’S CODE”).

<sup>181</sup> ST. MARY’S CODE, *supra* note 180 (providing for “corrective action up to and including discharge or removal from duty”).

<sup>182</sup> See, e.g., *id.* (providing vaguely that “[a]ll employees must acquaint themselves with the legal standards and restrictions applicable to their duties and responsibilities and conduct themselves accordingly” and stating expansively that “[n]o gifts of substantial value or lavish entertainment shall be offered, furnished, or accepted by anyone” without defining “gifts,” “substantial,” or “lavish,” or exempting from the rule gifts that might be unobjectionable because of the nature of a relationship between the giver and the recipient, the occasion, or other circumstances).

<sup>183</sup> See, e.g., *AALS Statement of Good Practices*, *supra* note 179, at I (stating that “Sexual relationships between a professor and a student who are not married to each other or who do not have a preexisting analogous relationship are inappropriate whenever the professor has a professional responsibility for the student in such matters as teaching a course or in otherwise evaluating, supervising, or advising a student as part of a school program. Even when a



including some documents enacted in the wake of the federal Sarbanes-Oxley Act's heightened attention to institutional ethics,<sup>184</sup> are frequently half-hearted attempts to promote sound ethics, occasionally more akin to "window dressing" than to a serious ethics regime.

Legislative ethical standards, including state conflict-of-interest provisions applicable to public colleges and universities, are often both precise and legally enforceable.<sup>185</sup> However, these kinds of rules commonly suffer from other deficiencies. Sometimes they focus on narrow issues and lack the textual coherence of a comprehensive ethics code. Other times, the rules are applicable only to certain persons in the educational field, ignoring other relevant actors whose conduct can be a source of corruption. In addition, if there are no special enforcement mechanisms, prosecutors busy with pursuing the perpetrators of violent crime and breaches of general criminal laws may accord low priority to holding violators of these ethical provisions accountable.

A dedicated effort to articulate enforceable ethics standards for college and university faculty members would do well to borrow principles from the government ethics field. While American government ethics codes vary greatly in their scope, coverage, and enforcement

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professor has no professional responsibility for a student, the professor should be sensitive to the perceptions of other students that a student who has a sexual relationship with a professor may receive preferential treatment from the professor or the professor's colleagues. A professor who is closely related to a student by blood or marriage, or who has a preexisting analogous relationship with a student, normally should eschew roles involving a professional responsibility for the student"); ST. MARY'S UNIV., FACULTY HANDBOOK § 2.9.2.1(c) (2006), available at [http://www.stmarytx.edu/faculty\\_senate/pdf/2006\\_faculty\\_handbook.pdf](http://www.stmarytx.edu/faculty_senate/pdf/2006_faculty_handbook.pdf) (last visited May 1, 2007) (providing that "no faculty member shall . . . date any student registered in a class taught by the faculty member or otherwise evaluated, supervised, or officially advised by the faculty member").

<sup>184</sup> See Oxholm, *supra* note 157, 361-62 (discussing codes of conduct).

<sup>185</sup> For example, Texas law provides that "a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest." TEX. GOV'T CODE ANN. § 572.001(a) (Westlaw 2007). Employees of state universities are subject to this rule because "[s]tate employee" means an individual . . . employed by . . . a state agency," *id.* at § 572.002(11)(a), and the term "state agency" includes "a university system or an institution of higher education . . . other than a public junior college," *id.* at § 572.002(10)(B). See also *id.* at § 572.005 (defining what constitutes a "substantial interest in a business entity"). Cf. Glater, *supra* note 81, at A13 (discussing the rules applicable to the University of Texas System).

mechanisms,<sup>186</sup> certain principles of good conduct have emerged with clarity and enjoy widespread acceptance. Among these principles are basic rules against using official power for improper economic benefit,<sup>187</sup> unfairly advancing or impeding private interests,<sup>188</sup> trading reciprocal favors,<sup>189</sup> accepting inappropriate gifts,<sup>190</sup> and engaging in conflicting outside employment or business activities.<sup>191</sup> These topics, which are discussed in the following sections, are as relevant in higher education as in other areas of public life. While American rules may not be fully transportable to other countries, they offer a starting point for debating and shaping ethics rules consistent with the values and institutions of other nations. As has been said in the government ethics context, “[even] if the United States model is too complex to be readily exported, . . . it can still provide guidelines for countries beginning to develop norms of professional bureaucratic behavior.”<sup>192</sup>

#### **a. Improper Economic Benefit**

In academia, as in other areas of public life, there is a temptation to use official power to gain economic benefits for oneself or closely related persons and entities.<sup>193</sup> One aspect of this problem is nepotism, a pernicious worldwide practice<sup>194</sup> that is broadly condemned.<sup>195</sup> However,

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<sup>186</sup> Cf. Johnson, *Ethics in Government*, *supra* note 23, at 725 (opining that “in many cities the ethics rules are not a clear and coherent document, but either non-existent or a tangle of disparate provisions that often lack coherent themes or have serious omissions”).

<sup>187</sup> *Id.* at 729-32.

<sup>188</sup> *Id.* at 732-34.

<sup>189</sup> *Id.* at 733-34.

<sup>190</sup> *Id.* at 734-36.

<sup>191</sup> *Id.* at 738.

<sup>192</sup> ROSE-ACKERMAN, *supra* note 12, at 77 (noting further that even the “harshest critics of the American system do not seriously argue that procurement officers ought to be allowed to own shares in the contractors or accept salaries or large gifts from firms with which they do business”).

<sup>193</sup> Cf. Steven R. Weisman, *Turmoil Grows for Wolfowitz at World Bank*, N.Y. TIMES, Apr. 13, 2007 (reporting that the tenure of the president of the World Bank was “thrown into turmoil . . . by the disclosure that he had helped arrange a pay raise for his companion at the time of her transfer from the bank to the State Department, where she remained on the bank payroll”).

<sup>194</sup> See Sim Kyazzewas, *Varsity Fat Cats*, FIN. MAIL, Aug. 11, 2006, at 6, 2006 WLNR 13933421 (noting that a South African vice chancellor was “fired after a disciplinary tribunal

there are other variations. In cases involving misuse of power for economic benefit,<sup>196</sup> the chief “motivator is self-interest, including an interest in the well-being of one’s family and peer group. Critics call it greed.”<sup>197</sup> These same temptations exist in the governmental sector, and therefore numerous cities and other public entities have passed laws which prohibit government officials or employees from taking any official action that is likely to result in economic benefit to the individual official or employee; to his or her close family members, outside employers, or clients; to businesses in which the official or employee, or a closely related person, owns an interest or serves in a policy making capacity; or to parties from which he or she has solicited or received an offer of employment or a business opportunity.<sup>198</sup> Customarily, the official or employee who has

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found him guilty on 161 of 166 counts of corruption, fraud and nepotism”); Fisher, *supra* note 80 (discussing a community college, which lost its accreditation, as a result of alleged “corruption, nepotism and incompetence”).

<sup>195</sup> Editorial, *Our Turn: Board’s Latest Action Won’t Reassure Public*, SAN ANTONIO EXPRESS-NEWS, Aug. 12, 2006, at 10B, 2006 WLNR 13981728 (criticizing a school district for “keeping their controversial bond manager on the payroll” after he “came under question when it was learned that he was recommending hiring an underwriting company that employed his son”).

<sup>196</sup> Matthews & Hong, *supra* note 5 (discussing a California community college board member who placed his brother’s “construction and maintenance contract on the board agenda himself and voted for it,” winning approval by a 3-2 margin).

<sup>197</sup> See ROSE-ACKERMAN, *supra* note 12, at 2,

<sup>198</sup> See, e.g., CODE OF ETHICS OF THE CITY OF SAN ANTONIO (Texas, USA) §2-43(a) (2007), available at <http://www.sanantonio.gov/atty/Ethics/codetext.htm> (hereinafter SAN ANTONIO ETHICS CODE) (last visited May 1, 2007). Section 2-43(a). That section provides:

(a) General Rule. To avoid the appearance and risk of impropriety, a city official or employee shall not take any official action that he or she knows is likely to affect the economic interests of:

- (1) the official or employee;
- (2) his or her parent, child, spouse, or other family member within the second degree of consanguinity or affinity;
- (3) his or her outside client;
- (4) a member of his or her household;
- (5) the outside employer of the official or employee or of his or her parent, child . . . , spouse, or member of the household . . . ;
- (6) a business entity in which the official or employee knows that any of the persons listed in Subsections (a)(1) or (a)(2) holds an economic interest . . . ;
- (7) a business entity which the official or employee knows is an

an improper-economic-benefit conflict of interest is required to step aside from the matter in question and refrain from any participation in its resolution.<sup>199</sup>

In the governmental sector, a well-crafted rule against improper economic benefit is an essential principle<sup>200</sup> of any sound ethics code. The question is whether similar rules can and

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affiliated business or partner of a business entity in which any of the persons listed in Subsections (a)(1) or (a)(2) holds an economic interest . .

. ;

(8) a business entity or nonprofit entity for which the city official or employee serves as an officer or director or in any other policy making position; or

(9) a person or business entity with whom, within the past twelve months:

(A) the official or employee, or his or her spouse, directly or indirectly has

(i) solicited an offer of employment for which the application is still pending,

(ii) received an offer of employment which has not been rejected, or

(iii) accepted an offer of employment; or

(B) the official or employee, or his or her spouse, directly or indirectly engaged in negotiations pertaining to business opportunities, where such negotiations are pending or not terminated.

The efficacy of this kind of rule depends upon how “official action” and “economic interest” are defined. *See id.* at § 2-42(n) & (v) (defining terms). *See also* DALLAS, TEX., CODE OF ORDINANCES, ch. 12A, § 12A-3 (2007), *available at* <http://www.amlegal.com/library/tx/dallas.shtml> (last visited April 8, 2007) (prohibiting improper economic benefit).

<sup>199</sup> *See, e.g.*, SAN ANTONIO ETHICS CODE, *supra* note 198, at § 2-43(b) (providing that a city official or employee with an economic-interest conflict of interest “shall: (1) immediately refrain from further participation in the matter, including discussions with any persons likely to consider the matter; and (2) promptly file with the City Clerk the appropriate form for disclosing the nature and extent of the prohibited conduct” and in addition “(3) a supervised employee shall promptly bring the conflict to the attention of his or her supervisor, who will then, if necessary, reassign responsibility for handling the matter to another person; and (4) a member of a board shall promptly disclose the conflict to other members of the board and shall not be present during the board’s discussion of, or voting on, the matter”).

<sup>200</sup> *See* Johnson, *Ethics in Government*, *supra* note 113, at 729 (describing this type of rule as the “heart of any government ethics code”).

should play a role in higher education. The answer is clearly “yes.”

First, in terms of feasibility, some colleges and universities already embrace such principles,<sup>201</sup> albeit occasionally in merely rudimentary form.<sup>202</sup> Second, in *public* educational institutions, it is reasonable to argue that officials and employees should be governed by the same prohibitions against improper economic benefit that often apply to broad classes of elected and appointed public officials and employees.<sup>203</sup> It makes little difference whether the public college or university is wholly or partially funded by public money. In the government sector, ethics rules commonly apply not only to full-time employees, but also to part-time employees<sup>204</sup> and persons who are not employees at all, but merely volunteers serving on boards or commissions or in other public positions.<sup>205</sup> The critical question is not whether or how much the actor is being paid by the public, but whether he or she is engaged in conducting the public’s business. If the actor is undertaking conduct pursuant to authority conferred by the citizenry, the public has an interest in how those tasks are performed that is sufficient to warrant the imposition of standards of conduct. Third, it would be difficult to maintain that *private* higher educational institutions

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<sup>201</sup> See HOWARD UNIV. CODE, *supra* note 170, at IV-B (stating that “[n]o member of the University Community may approve, recommend, or promote a business transaction in which that person has a direct personal interest, or otherwise cause the University to do business with a firm in which that person is an officer or senior management employee or in which that person (directly or indirectly) owns more than a five percent equity interest” unless the relationship is disclosed and certain conditions are met). See also Jonathan D. Glater, *A Lender Sought Favor at College, Papers Say*, N.Y. TIMES, Apr. 14, 2007 (reporting that a university executive vice president who served on the board of a private lender complied with the university’s conflict of interest policy by recusing himself from “student loan discussions and decisions at the university”).

<sup>202</sup> See ST. MARY’S UNIV, *supra* note 183, at § 2.9.2.1(b) (providing that “no faculty member shall . . . participate in a decision to employ, compensate, promote, or grant tenure to a person related to the faculty member within the second degree of consanguinity or affinity, vote on such decision, or attend that portion of any meeting at which such decision is discussed”).

<sup>203</sup> For example, the ethics code of the City of San Antonio, Texas, applies to more than 11,000 city officials and employees. See Johnson, *Ethics in Government*, *supra* note 113, at 715 n.\*.

<sup>204</sup> See SAN ANTONIO ETHICS CODE, *supra* note 198, at § 2-42(o) (indicating that the city ethics code applies to “any person listed on the City of San Antonio payroll as an employee, whether part-time or full-time.”)

<sup>205</sup> See *id.* at § 2-42(u) (providing the officials subject to the city ethics code are “[m]embers of all boards . . . including entities that may be advisory only in nature,” with limited exceptions).

should stand on different footing than their state-assisted counterparts. Private colleges and universities are strongly affected with the public interest. These institutions benefit from a myriad of state and federal programs, including government research grants and, more importantly, student loan funding, without which most private educational institutions could not long exist. Non-profit private educational institutions also greatly benefit from their tax-free status. In light of these factors, it is impossible to argue persuasively that there is nothing wrong with private college and university officials and employees using their positions to secure economic benefits for themselves, their families members, or their business associates at the expense of the institutions they serve or those institutions' beneficiaries. "In large measure, non-profits," including non-profit colleges and universities, "enjoy the special benefits they receive . . . [under the law] because they do the public's business."<sup>206</sup> "The substantial financial assistance they receive indirectly from all levels of governments, even without regard to grants, arguably makes them more deserving of governmental oversight and control than publicly-traded companies, because it is the public's tax money, not that of private investors, that is being spent."<sup>207</sup>

In many instances, it may be difficult for colleges and universities to adhere to rules prohibiting officials and employees from taking official action that affects their personal economic interests. For example, at some universities, faculty members sit on committees which dole out research grants to applicants (including members of the committee).<sup>208</sup> At other institutions, faculty members sit on course scheduling committees which make decisions that determine which faculty members (including members of the committee) get the opportunity to teach "overload" courses for which additional compensation is paid. Yet, these are the types of issues which lie at the crux of a rule prohibiting persons from taking any official action that is likely to result in personal economic benefit. Ethically, the better course is for faculty members to recuse themselves from such matters and neither formally or informally participate in their resolution. Presumably, this is why most educational institutions organize their financial affairs so that a request for reimbursement of expenditures ultimately must be authorized by someone other than the applicant. Likewise, if the financial aid officer own shares in private lenders, the director should not be permitted to sit on the committees which determine how a university's "preferred lenders"<sup>209</sup> are selected<sup>210</sup> or to refer students to lenders in which the director has an

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<sup>206</sup> Oxholm, *supra* note 157, at 353.

<sup>207</sup> *Id.* at 353-54.

<sup>208</sup> See Washburn, *supra* note 93, at 12 (describing a research committee at a major university which in 1999 awarded three of its members grants in the amounts of \$200,000, \$125,000, and \$200,000).

<sup>209</sup> "Students generally rely on . . . [lists of preferred lenders] for seeking a loan rather than shopping for the best terms." Jonathan D. Glater & Karen W. Arenson, *Federal Official in Student Loans Held Stock*, N.Y. TIMES, Apr. 6, 2007. "More than 90% of student borrowers

economic interest. Institutional endorsement of a broadly applicable rule prohibiting college and university officials and employees from taking official action that affects personal or closely related economic interests will go a long way toward dispelling concerns<sup>211</sup> about corruption in academia.

In the government ethics field, definitions have evolved which can help educational institutions to chart a prudent course in dealing with risks relating to improper economic benefit. These rules define what constitutes an “economic benefit,”<sup>212</sup> and when official action is “likely to affect” an economic interest.<sup>213</sup> Educational institutions would be wise to consult this evolving area of government ethics jurisprudence.

#### **b. Unfair Advancement of Private Interests**

To be fully effective, a rule against using official power for improper economic benefit must be coupled with a more broadly framed prohibition against unwarrantedly advancing or impeding private interests. That type of standard, which can often be found in government ethics codes,<sup>214</sup> recognizes that improper economic benefit is merely one aspect of a larger problem,

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choose a lender recommended by their college’s financial aid office.” Sandra Block, Kathy Chu & Adam Edelman, *How Students Borrow for College Could Soon Change*, USA TODAY, Apr. 24, 2007, at [http://www.usatoday.com/money/industries/banking/2007-04-24-student-loan-future-usat\\_N.htm](http://www.usatoday.com/money/industries/banking/2007-04-24-student-loan-future-usat_N.htm).

<sup>210</sup> See Glater, *supra* note 81, at A13 (reporting that according to the National Association of Student Financial Aid Administrators, an administrator’s ownerships of shares in a lender “may not be evidence of improper conduct, but would certainly present the appearance of a conflict of interest”).

<sup>211</sup> See, e.g., Editorial, *supra* note 86 (discussing “troubling questions” relating to a university’s “willingness to subcontract work to friends and associates of the department’s leaders”).

<sup>212</sup> See SAN ANTONIO ETHICS CODE, *supra* note 198, at § 2-42(n) (defining economic interest).

<sup>213</sup> *Id.* at § 2-43(c)(1) (providing that “[a]n action is likely to affect an economic interest if it is likely to have an effect on that interest that is distinguishable from its effect on members of the public in general or a substantial segment thereof”).

<sup>214</sup> *Id.* at § 2-44(b) (stating that “[a] city official or employee may not use his or her official position to unfairly advance or impede private interests, or to grant or secure, or attempt to grant or secure, for any person (including himself or herself) any form of special consideration,

namely failing to make decisions based on the merits.<sup>215</sup> Economic greed is often the distorting influence that causes an unmerited result, but there are other possibilities which should not be overlooked. Reflecting this concern, the *Howard University Code of Ethics and Conduct* expressly provides that members of the board of trustees, faculty members, and administrative personnel:

shall not offer University resources to another in order to obtain an unfair advantage, not based on the merits of the transaction, or otherwise offer those resources in a manner or under circumstances that would establish a violation of the law.<sup>216</sup>

For similar reasons, college and university rules often restrict whether a faculty members can instruct and grade a family member. For example, the *St. Mary's University Faculty Handbook* states that:

no faculty member shall . . . instruct for credit a person related to the faculty member within the second degree of consanguinity or affinity, except where such faculty member is the only faculty member teaching the subject during an academic year and makes arrangements for another faculty member to grade the student's work.<sup>217</sup>

The abundance of news reports<sup>218</sup> relating to corruption in American community colleges

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treatment, exemption, or advantage beyond that which is lawfully available to other persons”).

<sup>215</sup> See Johnson, *Ethics in Government*, *supra* note 113, at 732-34 (discussing unfair advancement of private interests).

<sup>216</sup> HOWARD UNIV. CODE, *supra* note 170, at IV-a. The quoted provision might be made more effective by drafting it more broadly. See note 214. See also ST. MARY'S CODE, *supra* note 180 (providing that “[n]o employee shall take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair-dealing practice”).

<sup>217</sup> ST. MARY'S UNIV, *supra* note 183, at § 2.9.2.1(a).

<sup>218</sup> See Michelle M. Martinezand, *Sam Houston Faces Battle for Its Future*, SAN ANTONIO EXPRESS-NEWS, Aug. 28, 2006, at 01A, 2006 WLNR 14901199 (indicating that a school principal, who was “charged in a public corruption scandal in his role as a trustee on the Alamo Community College District board,” “pleaded no contest to a misdemeanor charge and received probation”); *Three Enter Plea Deals to Avoid a Trial*, HOUS. CHRON, June 5, 2003, at A37, 2003 WLNR 16365039 (discussing pleas entered by two community college trustees to avoid a trial on public corruption charges). See also Matthews & Hong, *supra* note 5 (discussing lavish and unauthorized spending).



suggests that they are structurally more vulnerable to the problems caused by non-merit-based decision making than other higher education institutions. Critics sometimes argue that community colleges are dedicated more to political patronage than educational excellence, and are therefore resistant to reform because often state legislators are “employees of the system and fight to protect its existence rather than seek to improve it.”<sup>219</sup> In these types of situations, articulation and enforcement of a rule against actions that result in unfair advantage is particularly important

In some cases, members of college and university admissions committees might logically be required to abstain from voting on the applications of candidates they know personally, since such conduct poses a serious risk of conferring an unwarranted advantage over other applicants. There is notable precedent for this type of prophylactic practice. “Unlike Harvard’s undergraduate admissions, its law school does have a conflict-of-interest policy.”<sup>220</sup> “[M]embers who know a student or a student’s family cannot vote on that candidate.”<sup>221</sup> Similarly, the Council for the International Exchange of Scholars directs members of peer review committees evaluating Fulbright Senior Specialist applications to “recuse themselves from evaluation, discussion and final recommendation” regarding applicants with whom the “reviewer has some other significant personal or professional relationship” which could bias or prejudice the reviewer’s judgment about the applicant.<sup>222</sup> As examples of relationships where recusal is required, the Council’s guidelines list “members of the same department, co-authors, [and] research collaborators.”

In determining whether a recusal rule is desirable, a distinction might be drawn with reference to the stakes involved. When the stakes are high—e.g., gaining admission to an elite university or to a state university offering substantially lower tuition than private counterparts—greater procedural fairness is warranted. Even if recusal is not required, disclosure of the relationship between the committee member and applicant to other members of the committee is appropriate. Persons sometimes suggest that corruption in admissions practices can be automatically solved by rotating the membership of the admissions committee. However, that type of structural change may simply mean that the power to make decisions becomes

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<sup>219</sup> See James Alexander, Letter to Editor, *Greed, Corruption Not Surprising*, BIRMINGHAM NEWS (AL), Aug. 28, 2006, at 4, 2006 WLNR 14955922.

<sup>220</sup> GOLDEN, *supra* note 90, at 35.

<sup>221</sup> *Id.* at 35.

<sup>222</sup> Council for the International Exchange of Scholars, *Fulbright Senior Specialists Program*, Eligibility/Conflict of Interest, at [http://www.iie.org/cies/specialists/ss\\_overview\\_PR.htm](http://www.iie.org/cies/specialists/ss_overview_PR.htm) (last visited May 6, 2007).

concentrated in the staff or related administrators.<sup>223</sup> Even if committee membership rotates, it is important to have a conflict-of-interest policy that requires recusal or disclosure.

One particular aspect of improperly advancing private interests “back-scratching,” a practice that is sometimes found in higher education; “You take care of my wife, and I’ll take care of your son”.<sup>224</sup> Good government ethics codes contain provisions prohibiting these types of reciprocal favors, and similar language can be included in ethics codes for college and university faculty members, administrators, and staff. Not surprisingly, questions were raised in the media about the appearance of inappropriate reciprocity when a New Jersey legislator, who made \$49,000 a year as a senator, received a part-time \$35,000 job as an adjunct professor at a state university “shortly after helping the university receive \$11 million in state aid” for a new law school building.<sup>225</sup>

### c. Gifts

Gifts are similar to bribes.<sup>226</sup> In either case, there is a threat that decisions will not be made based on the merits, but on favoritism and other improper considerations. Even where a gift does not in fact distort the exercise of judgment, there is an appearance (or at least the risk of an appearance) of impropriety. Other persons will perceive that the gift-giver stands in a favored position that cannot be attained in the absence of professing a gratuity. To preserve confidence in public institutions—including colleges and universities—receipt of gifts should be carefully regulated. Faculty ethics codes and related professional standards of conduct should contain a provision addressing this subject.<sup>227</sup> Unfortunately, the resolve to enact these types of restrictions

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<sup>223</sup> Cf. ROSE-ACKERMAN, *supra* note 12, at 84 (stating in the government corruption context that “the rotation of officials may not be desirable if it makes other types of incentives ineffective and gives corrupt supervisors undue power”).

<sup>224</sup> See Demonio, *supra* note 6 (discussing a corrupt community college culture).

<sup>225</sup> See Dwight Ott, *Rutgers Law School Lauds Bryant for New Building*, PHILA. INQUIRER, Sept. 26, 2006, at B03, 2006 WLNR 16646488.

<sup>226</sup> Cf. ROSE-ACKERMAN, *supra* note 12, at 96-97 (discussing the similarity of gifts and bribes).

<sup>227</sup> See ST. MARY’S CODE, *supra* note 180 (providing that “[g]ifts, gratuities, entertainment and similar favors may not be accepted if [they are] offered, or appear to be offered, as an inducement to perform an act inconsistent with the best interest of the University or if acceptance would place the recipient under an obligation to the provider. Receipt of or payment of kickbacks or bribes by employees in any way related to the performance of their duties for or on behalf of the University is considered a violation of this Code”).

is sometimes missing. Before the recent student loan scandal<sup>228</sup> broke, “the National Association of Student Financial Aid Administrators sensed a need to keep tabs on ties between aid officers and the lenders in hot pursuit of student-loan business,” yet it neglected to adopt “clear rules to curb gifts from lenders.”<sup>229</sup>

The considerations relevant to crafting an effective rule on gifts have been laid out in the law of government ethics<sup>230</sup> and judicial ethics.<sup>231</sup> Those matters need not be dwelt

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<sup>228</sup> See Glater, *supra* note 87; Editorial, *supra* note 87; Paley, *supra* note 88.

<sup>229</sup> David Armstrong & Daniel Golden, *Trade Groups Saw Possible Conflicts in Student Loans*, WALL ST. J., Apr. 12, 2007.

<sup>230</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 198, at § 2-45. In relevant part, section 2-45 provides:

(a) General Rule.

(1) A city official or employee shall not solicit, accept, or agree to accept any gift or benefit for himself or herself or his or her business:

(A) that reasonably tends to influence or reward official conduct;

or

(B) that the official or employee knows or should know is being offered with the intent to influence or reward official conduct. . . .

(2) A city official or employee shall not solicit, accept, or agree to accept any gift or benefit, from:

(A) any individual or entity doing or seeking to do business with the City; or

(B) any registered lobbyist or public relations firm; or

(C) any person or entity seeking action or advocating on zoning or platting matters before a city body,

save and except for

i) items received that are of nominal value; or

ii) meals in an individual expense of \$50 or less at any occurrence, and no more than a cumulative value of \$500 in a single calendar year from a single source. . . .

(b) Special Applications. Subsection (a)(2) does not include:

(1) a gift to a city official or employee relating to a special occasion, such as a wedding, anniversary, graduation, birth, illness, death, or holiday, provided that the value of the gift is fairly commensurate with the occasion and the relationship between the donor and recipient;

(2) advancement for or reimbursement of reasonable expenses for travel in connection with official duties authorized in accordance with city policies . . . ;

upon here since similar principles for determining whether gifts are objectionable or innocuous can readily be applied in the context of higher education. In this area, as in others, *de minimis non curat lex*.<sup>232</sup> In general, the best course is for a prohibition on gifts to be broadly drafted, but then qualified with clear exceptions which precisely indicate what forms of gifts are permissible because of their size, the relationship of the parties, or other circumstances. A rule that is written too narrowly<sup>233</sup> may fail to prohibit certain kinds of gifts which should not be permitted,

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(3) a public award or reward for meritorious service or professional achievement, provided that the award or reward is reasonable in light of the occasion . . . ;

(4) a loan from a lending institution made in its regular course of business on the same terms generally available to the public;

(5) a scholarship or fellowship awarded on the same terms and based on the same criteria that are applied to other applicants;

(6) any solicitation for civic or charitable causes;

(7) admission to an event in which the city official or employee is participating in connection with his or her spouse's position;

(8) ceremonial and protocol gifts presented to city officials from a foreign government or international or multinational organization and accepted for the City of San Antonio;

(9) admission to a widely attended event, such as a convention, conference, symposium, forum, panel discussion, dinner, viewing, reception or similar event, offered by the sponsor of the event, and unsolicited by the City official or employee, if attending or participating in an official capacity . . . ,

(10) admission to a charity event provided by the sponsor of the event, where the offer is unsolicited by the City official or employee;

(11) admission to training or education program, including meals and refreshments furnished to all attendees, if such training is related to the official or employee's official duties and the training is in the interest of the City;

(12) lodging, transportation, or entertainment that the official or employee accepts as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law, up to \$500 from a single source in a calendar year.

<sup>231</sup> See CODE OF JUDICIAL CONDUCT R. 3.13 (2007) (stating general rule and exceptions).

<sup>232</sup> "The law does not concern itself with trifles." BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>233</sup> For example, one ethics code provides that "No Trustee, member of the Faculty, or employee of the University shall receive or solicit anything of value in return for influencing or exercising his/her discretion in a particular way on a University matter." HOWARD UNIV. CODE, *supra* note 170, at IV-C. It is easy to see how a an employ might argue that a gift was not

The importance of a rule against gifts is keenly illustrated by the recent scandal<sup>234</sup> relating to student loans, whereby colleges and universities received kickbacks for referring students to private lenders.<sup>235</sup> As part of the scheme, lenders “invited university officials on expense-paid retreats”<sup>236</sup> or rewarded them with “money, stock, and other perks,”<sup>237</sup> such as tickets to “Broadway shows, pricey restaurant meals and private access to tourist attractions.”<sup>238</sup> In one case, “Albany-to-New York plane tickets [were purchased] for two university financial aid officers so they could go to the theater.”<sup>239</sup> The gifts were not just a question of bad appearances, because at least one major university “financial-aid office . . . partly rated student lenders based on how they treated officials to meals and other extras.”<sup>240</sup> After litigation was threatened by the attorney general of New York, numerous entities paid settlements totaling in the millions of dollars to educate and reimburse borrowers.<sup>241</sup> In addition, numerous educational institutions<sup>242</sup>

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prohibited because it was not “in exchange for . . . .”

<sup>234</sup> See Editorial, *supra* note 87 (calling for Congress to address the scandal involving “troubling—and possibly illegal—payments to universities that steer students to so-called preferred lending companies”); Editorial, *Student Loan Scandal Hurts Youth, Parents*, SAN ANTONIO EXPRESS-NEWS, Apr. 23, 2007, at 4B (complaining that when college and university financial aid officials receive financial awards for directing students to certain firms, “students, in turn, have been charged higher interest rates than they might have received under a more open process”).

<sup>235</sup> See Bloomberg News, *6 More Colleges Agree to Lender Guidelines*, BOSTON GLOBE, May 1, 2007 (indicating that one university had a “revenue-sharing agreement” with a private lender “through which it received \$13,883,” which the university later agreed to reimburse to students).

<sup>236</sup> Jonathan D. Glater, *Millions to Be Repaid After College Loan Inquiry*, N.Y. TIMES, Apr. 3, 2007.

<sup>237</sup> Valerie Strauss, *Area Colleges Scrutinizing Financial Aid Practices*, WASH. POST, Apr. 13 (discussing allegations).

<sup>238</sup> Armstrong & Golden, *supra* note 229, at A1.

<sup>239</sup> See Dillion, *supra* note 3, 22.

<sup>240</sup> Reuters, *University Aid Office Rated Lenders on Perks*, May 1, 2007, available at <http://www.msnbc.msn.com/id/18412817/> (last visited May 5, 2007).

<sup>241</sup> Glater, *supra* note 81, at A13 (reporting that five universities agreed “to pay back \$3.2 million to students to resolve an investigation of arrangements in which the institutions were paid by lenders based on student loan volume. Citibank also agreed to pay \$2 million to a fund to educate students and parents about student loans”); Bloomberg News, *6 More Colleges Agree to Lender Guidelines*, BOSTON GLOBE, May 1, 2007 (indicating that five loan companies and 21

and Citibank agreed to a code of conduct under which “universities and their employees are prohibited from receiving ‘anything of value from any lending institution in exchange for any advantage,’ . . . [and] would have to disclose the criteria used to select preferred lenders.”<sup>243</sup>

Of course, the issues of fairness relating to student loans are of such widespread importance that it might be well to address them through legislation, rather than merely via college and university or professional organization codes of conduct. Legislation has been proposed at the federal level, but it remains to be seen whether Congress will enact the Student Loan Sunshine Act, which “would make it a federal crime for lenders to offer college officials anything of value in exchange for the right to do business at a given school.”<sup>244</sup> “In recent years, [Department of Education] officials monitoring financial aid were informed about several questionable practices by lenders, yet they were slow to crack down.”<sup>245</sup> Problems relating to “improper inducements” from lenders were not addressed by the Department, despite a clear warning from its inspector general.<sup>246</sup> The Department’s failure to act may be attributable to the “revolving door” between government service and work in the private sector. Several key government officials in the Education Department “came from student loan or related organizations or have taken lucrative jobs in that arena since leaving the agency.”<sup>247</sup> That type of easy role modification, which amount to switching side from being “the regulator” to “the regulated,” or vice versa, results in what is called “administrative capture.” In such situations, a regulatory agency lacks the independence necessary for performing its job.

While ethical and legal restrictions on gifts are important, they are not the only tools for minimizing the distorting role of gifts in higher education. Educators are more likely to accept or

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educational institutions paid a total of \$9.9 million) (hereinafter “Lender Guidelines”).

<sup>242</sup> See *Lender Guidelines*, *supra* note 241.

<sup>243</sup> Glater, *supra* note 236.

<sup>244</sup> Editorial, *supra* note 2.

<sup>245</sup> John Hechinger & Anne Marie Chalker, *How Could the Student Loan Scandal Happen?*, WALL ST. J., Apr. 13, 2007, at B1. See also Amit R. Paley, *Warnings On Student Lenders Unheeded*, WASH. POST, May 1, 2007, at A01 (asserting that “The Bush administration killed a proposal to clamp down on the student loan industry six years ago following allegations that companies sought to shower universities with financial favors to help generate business”).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* See also Johnson, *Regulating Lobbyists*, *supra* note 113, at 38 (discussing “administrative capture”).

demand bribes if they receive inadequate compensation for their services.<sup>248</sup> Thus, appropriate salary levels help to reduce the temptations for them to accept gratuities that are inappropriate.

#### **d. Conflicting Outside Employment and Business Interests**

College and university representatives should be prohibited from engaging in outside employment or business activities which conflict with the performance of their official duties. These conflicts may arise in a variety of ways. However, anything which creates a substantial risk that the representative, in serving the educational institution, will fail to consider options that should be considered, or will fail to recommend or carry out steps that should be taken, is a potential conflict of interest. In addressing this problem, rules must again be structured to guard against not only impropriety, but also bad appearances. Even if there is no “actual harm” to the college or university, confidence in the institution is diminished if its assistant vice president’s outside business is paid tens of thousands of dollars by a company that markets private student loans to students of the university;<sup>249</sup> if its financial aid director receives a large amount of money to develop a business plan for a private lender<sup>250</sup> or serve as a consultant;<sup>251</sup> or if a financial aid officer sits on the board of a private lender which might benefit from advice given to students.<sup>252</sup>

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<sup>248</sup> Cf. ROSE-ACKERMAN, *supra* note 12, at 155 (stating that “[b]ribes are more likely to be accepted or demanded by judges and their functionaries if they are underpaid and work under conditions worse than those of private lawyers and their assistants”).

<sup>249</sup> See Paley, *supra* note 88 (reporting that a Pennsylvania university placed “an assistant vice president for finance, on administrative leave after New York state investigators disclosed that Student Loan Xpress paid \$80,000 to a business [the assistant vice president] runs”); Dillon, *supra* note 5, 106 (discussing conferences sponsored by a university vice president, which lenders listed on the university’s preferred lender list paid thousands of dollars to participate in).

<sup>250</sup> See Paley, *supra* note 88 (reporting that an online university placed its financial aid director “on leave during an internal probe of \$12,400 he received . . . to develop a business plan” for a private lender).

<sup>251</sup> See Amit R. Paley, *Hopkins Official Implicated as Student Loan Investigation Widens*, Wash. Post, Apr. 10, 2007, at A05 (indicating that a university director of student financial services received more than \$65,000 from a private lender, including \$22,000 of tuition payments and “an additional \$43,000 in consulting fees and \$1,200 in travel expenses while she sat on the company’s advisory board”).

<sup>252</sup> See Jonathan D. Glater & Sam Dillon, *Student Lender Had Early Plans to Woo Officials*, N.Y. TIMES, Apr. 10, 2006, at A1 (discussing a company which had an “explicit plan for corraling a bigger share of the lucrative student loan business” by, among other things, putting university financial aid directors on its company advisory board).

To address these problems, a rule might be patterned on relevant provisions in government ethics codes. For example, the ethics code for the City of San Antonio provided that:

[a] city official or employee shall not solicit, accept, or engage in concurrent outside employment which could reasonably be expected to impair independence of judgment in, or faithful performance of, official duties . . . [or] provide services to an outside employer related to the official's or employee's city duties.<sup>253</sup>

Alternatively, many colleges and universities have enacted provisions which address some of the problems relating to outside employment or business interest. For example, the *St. Mary's University Employee Code of Business Conduct* provides in part:

Employees shall not have any financial or other relationships with suppliers, agencies or competitors that would impair, or appear to impair, the independence of any judgment they may make on behalf of the University.

. . . .

Employees are prohibited from . . . competing with the University.

Employees also may not acquire any ownership of a material interest in any competitor, vendor, customer, client, supplier, contractor, subcontractor, or other entity with which the University does business.<sup>254</sup>

#### **e. Other Provisions**

A good ethics code for faculty members needs to address other important issues relating to corruption, beyond those mentioned above. These issues include misuse of college or university property for private purposes, improper revelation or mishandling of confidential information,<sup>255</sup> usurpage of business opportunities,<sup>256</sup> discriminatory treatment of persons within

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<sup>253</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 198, at § 2-48.

<sup>254</sup> See ST. MARY'S CODE, *supra* note 180 (noting that "[t]his prohibition does not apply to incidental ownership of minimal stock interests pursuant to a mutual fund or other investments").

<sup>255</sup> See *id.* (requiring university employees to safeguard confidential information and "disclose it only as permitted by law or University policy").

<sup>256</sup> See *id.* (prohibiting university employees from "taking for themselves, [or for] a family member, friend or acquaintance opportunities that are discovered through the use of



or outside the academic community,<sup>257</sup> improper relationships with students,<sup>258</sup> and political activities involving the university's facilities, prestige, or resources. Guidance for drafting appropriate rules can be found in scholarship relating to ethics in government.<sup>259</sup>

One issue of particular difficulty is whether a college or university should be prohibited from contracting with a business in which a member of the faculty or other institutional representative (or an individual related to those persons) owns a substantial interest. It is easy to see that pressures might arise within an educational institution for such transactions to take place, even when they are not in the best interest of the college or university. Yet, if a rule is too broadly drafted to prohibit such transactions, the provision may make it unduly expensive or inconvenient for the institution to obtain needed goods or services.<sup>260</sup> Moreover, merely collecting relevant information about the outside business interests of all college and university employees in order to enforce a broad no-contracting rule may itself be such a time consuming task that it seriously diverts attention from the educational mission of the institution. Nevertheless, the issue cannot be ignored for contracting decisions pose a grave risk of corrupt practices unless ethical restrictions are clearly defined.

Government ethics codes sometime balance the various competing considerations by applying a no-contracting rule to businesses in which only certain high-level officials (or related persons) hold a significant economic interest.<sup>261</sup> The substantive restriction is then coupled with

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University property, information or position" and from "competing with the University").

<sup>257</sup> See HOWARD UNIV. CODE, *supra* note 170, at IV-E (providing that "[i]nvidious harassment, discrimination, or intimidation of students that deny or impede their right of access to . . . [educational] benefits and opportunities will not be tolerated and will be subject to disciplinary action"); see also Johnson, *Ethics in Government*, *supra* note 113, at 742-43 (discussing non-discrimination provisions in government ethics codes).

<sup>258</sup> See note 183 *supra* and the accompanying text.

<sup>259</sup> See Johnson, *Ethics in Government*, *supra* note 113, at 775 (offering a model provision for regulating use of public property and resources); *id.* at 776-77 (proposing a rule for regulating the political activities of city official and employees).

<sup>260</sup> See *id.*, at 739-41 (discussing how the problem affects both large cities and small towns).

<sup>261</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 198, at § 2-52. Section 2-52 provides in relevant part:

(a) . . . The Charter of the City of San Antonio . . . states "No officer or employee of the City shall have a financial interest, direct or indirect, in any contract with the City, or shall be financially interested, directly or indirectly, in

annual disclosure requirements which oblige persons within the specified group to identify business interests that exceed a certain threshold in terms of percentage of ownership or dollar value.<sup>262</sup> A similar pattern could be followed in higher education. A non-contracting rule and disclosure requirements could be made applicable only to the business interests of a select group, such as trustees, the president and vice presidents, and deans. Enacting this type of requirement will greatly reduce the likelihood of “sweetheart” deals that improperly favor businesses aligned with persons in the college or university community and will help to preserve confidence in the

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the sale to the City of any land, materials, supplies, or service, except on behalf of the City as an officer or employee. . . . Any violation of this Section, with the knowledge, expressed or implied, of the person or corporation contracting with the Council shall render the contract involved voidable by the City Manager or the Council.”

(b) . . . An officer or employee is presumed to have a prohibited “financial interest” in a contract with the city, or in the sale to the city of land, materials, supplies, or service, if any of the following individuals or entities is a party to the contract or sale:

- (1) the officer or employee;
- (2) his or her spouse, sibling, parent, child or other family member within the first degree of consanguinity or affinity;
- (3) a business entity in which the officer or employee, or his or her parent, child or spouse, directly or indirectly owns:
  - (A) ten (10) percent or more of the voting stock or shares of the business entity, or
  - (B) ten (10) percent or more of the fair market value of the business entity; or
- (4) a business entity of which any individual or entity listed in Subsection (1), (2) or (3) is:
  - (A) a subcontractor on a city contract;
  - (B) a partner; or
  - (C) a parent or subsidiary business entity.

. . . .  
 (e) . . . For purposes of enforcing . . . the City Charter under the provision of this Section:

- (1) a city “employee” is any employee of the city who is required to file a financial disclosure statement pursuant to Section 2-73(a) . . . .
- (2) a city “officer” is:
  - (A) the Mayor or any Council member;
  - (B) a Municipal Court Judge or Magistrate;
  - (C) a member of any board or commission which is more than advisory in nature.

<sup>262</sup> *Id.* at § 2-74(i) & (j).

business integrity of the educational institution.

### C. Preventing and Prosecuting Financial Corruption

In the United States and other countries,<sup>263</sup> basic criminal laws have been used to address financial corruption in education. In one recent American case, described as “one of the more brazen criminal raids on taxpayers’ money,”<sup>264</sup> the top educator in the state of Georgia was sentenced to eight years in prison after pleading guilty to charges of “embezzling about \$600,000 . . . to fund instead . . . her failed campaign for governor and a face-lift.”<sup>265</sup> The educator had been “indicted on 22 counts of money laundering and 18 other counts ranging from conspiracy to fraud, with each count carrying up to 20 years in prison.”<sup>266</sup> One of her associates also pleaded guilty to “theft of federal funds and wire fraud.”<sup>267</sup>

However legal practices vary widely around the world. Some countries punish educational corruption severely. For example, in Poland, plagiarism can result in criminal prosecution and imprisonment for up to two years.<sup>268</sup> However, other legal systems lack what many would think of as basic criminal prohibitions. “Some countries do not even criminalize the payment of bribes.”<sup>269</sup> Of course, anti-corruption laws are largely useless unless they are enforced, and enforcement depends to a great extent on the existence of an honest court

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<sup>263</sup> See *Court Issues Warrants in Shikha Case*, ECON. TIMES (India), Feb. 24, 2003, 2003 WLNR 4365393 (discussing litigation in India alleging that university officials had engaged in a criminal conspiracy relating to an examination and academic appointment).

<sup>264</sup> Editorial, *Temple’s Raiders*, AUGUSTA CHRON., Sept. 13, 2006, at A04, 2006 WLNR 16009705.

<sup>265</sup> Assoc. Press, *Former Shrenko Campaign Manager Seeks Bush Pardon*, MACON TELEGRAPH (Ga.), Nov. 27, 2006, 2006 WLNR 20506493 ) (hereinafter *Shrenko*). See also Dorie Turner, *Georgia Schools Ex-Chief in Prison*, CHARLESTON GAZETTE & DAILY MAIL (WV), Sept. 12, 2006, at 5D, 2006 WLNR 18597306 (reporting that “witnesses and prosecutors said she asked friends and family members—including the staffers in her daughter’s dental practice—to endorse a batch of \$590 checks that were later diverted to her campaign).

<sup>266</sup> *Shrenko*, *supra* note 265.

<sup>267</sup> *Id.*

<sup>268</sup> See *Red Tape Hot Box on Plagiarism*, WARSAW BUS. J. (Poland), Mar. 17, 2003, 2003 WLNR 99555 (hereinafter *Plagiarism*) (discussing penalties for plagiarism).

<sup>269</sup> See ROSE-ACKERMAN, *supra* note 12, at 53.

system.<sup>270</sup>

In the United States there are civil remedies for certain types of educational corruption. An aggrieved person or institution can sue for conversion, fraud, and tortious interference with contract or prospective advantage, among other things. It is important for public officers to pursue these remedies aggressively. This often means insisting on collection of a court ordered judgment, rather than entering into a compromised settlement. A newspaper editorial in one major American city praised a local school board for refusing an offer to settle for \$10,000 a civil court judgment for \$380,000 against an architect who had overbilled the district and was later sentenced to two years in prison as the “central figure in a . . . bid-rigging and bribery scandal.”<sup>271</sup> The editors opined that agreeing “to a settlement for a few cents on the dollar would only benefit . . . [the architect] by removing a big cloud over his financial portfolio and improving his creditworthiness.”<sup>272</sup>

It is possible to address some forms of corruption, such as financial mismanagement, quite specifically through procurement procedures<sup>273</sup> or other business-conduct requirements. A New York grand jury investigating financial wrongdoing in public schools recommended creating a state inspector general for education to investigate and report on corruption and other criminal activity in local school districts.<sup>274</sup> The grand jury further recommended passing new laws:

- requiring public school employees, school board members and persons doing business with a local district to report information about possible criminal conduct;
- creating compensation committees, including at least one local resident, to oversee and report to local school boards on all proposed contracts and make recommendations regarding proposed fringe benefits;
- requiring school boards to post on their websites or otherwise publish all

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<sup>270</sup> *Cf. id.* at 151 (stating that “[m]any countries have exemplary anticorruption statutes that are irrelevant in the real world . . . . Even if a nation’s prosecutors are actively engaged, they will mean little unless the country has an honest judicial system”).

<sup>271</sup> See Editorial, *Harlandale Right to Reject Offer*, SAN ANTONIO EXPRESS-NEWS, Mar. 15, 2007, at 6B

<sup>272</sup> *Id.*

<sup>273</sup> See ROSE-ACKERMAN, *supra* note 12, at 59-63 (discussing government procurement).

<sup>274</sup> See Lakin, *supra* note 5.

employment contracts and any amendments at least one month before any board vote;

- requiring school business administrators in large districts to have at least a master's degree in accounting or finances; and
- requiring the state Department of Education to provide mandatory continuing education every two years in accounting principles, fraud prevention, and fiscal management for every superintendent, assistant superintendent for business or business manager in a local school district.<sup>275</sup>

These are appropriate legal responses to the problem of the financial corruption in the public sector. Some college and university ethics codes already address related issues. For example, the *Howard University Code of Ethics and Conduct* quite sensibly provides that:

The accounts and records of the University are maintained in a manner that provide for an accurate and auditable record of all financial transactions in conformity with generally accepted accounting principles, established business practices, and all relevant provisions of controlling law. No false or deceptive entries may be made and all entries must contain an appropriate description of the underlying transaction. To the extent not needed for daily operating transactions, all University funds must be retained in the appropriate University accounts with appropriately designated financial institutions and no undisclosed or unrecorded fund or asset shall be established or maintained for any purpose. All reports, vouchers, bills, invoices, payroll information, personnel records, and other essential business records must be prepared with care and honesty.<sup>276</sup>

Presumably, these types of ethical provisions will proliferate in the United States since nonprofit educational institutions, including private colleges and universities, have begun to follow as “best practices” the type of institutional integrity guidelines that were mandated for certain public-sector business entities by the federal Sarbanes-Oxley Act.<sup>277</sup> One expert

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<sup>275</sup> See *id.*.

<sup>276</sup> HOWARD UNIV. CODE, *supra* note 170, at IV-D.

<sup>277</sup> See Oxholm, *supra* note 157, at 357-68 (discussing internal controls and external controls under Sarbanes-Oxley). But see Nicole Gilkeson, Note, *For-Profit Scandal in the Nonprofit World: Should States Force Sarbanes-Oxley Provisions onto Nonprofit Corporations?*, 95 GEO. L.J. 831, 854 (2007) (opining that reform in the nonprofit sector should follow a “unique path”).

concluded that “no college or university can afford not to adopt the ‘spirit’ of Sarbanes-Oxley”<sup>278</sup> and listed ten “best practices” that colleges and universities should consider:

1. Background checks for new hires;
2. Annual disclosure of conflicts of interest, required of employees and trustees alike, pursuant to a written conflict of interest policy or bylaw provision;
3. Code of conduct for employees and trustees that includes sanctions for non-compliance and a credible system for investigating and responding to allegations of improper conduct;
4. Written whistleblower policy and procedures that provides confidentiality and protects the caller from retaliation;
5. Periodic “risk assessments” by outside consultants;
6. Annual audit of financial statements by an independent certified public accountant (and, if the institution is large enough, hire an internal auditor);
7. At least one “financial expert” on the board;
8. An audit committee of the board, with a written charter specifying its jurisdiction and detailing its authority;
9. A nominating committee of the board, to ensure board independence from the president and senior management; and,
10. Standing instruction to legal counsel to notify general counsel, president, chair of board audit committee, and/or chair of board of wrongful conduct that is material to the institution.<sup>279</sup>

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<sup>278</sup> Oxholm, *supra* note 157, at 372 (opining that “[w]hat all institutions of higher education should take from the Act is an attitude: our investors—those who send us their children (and tuition), those who send us their gifts (alumni/ae and friends), and those who do business with us (in research and development efforts)—deserve to know that their money is being well and appropriately spent”).

<sup>279</sup> *Id.* at 375.

## V. Specific Problems

### A. Buying Admission into an Educational Program

Some forms of buying admission into an academic institution are perfectly acceptable under contemporary norms. In the United States, students often pay a much higher price, in terms of tuition and fees, for the chance to earn a degree from an Ivy League institution or a small private college than from a state university or a locally funded community college.<sup>280</sup> It is not corrupt for a student to elect to attend a high-priced academic institution, nor for the institution to charge higher tuition than its competitors. Moreover, within a single educational program, students with a low scores on a required standardized admissions test, such as the Scholastic Aptitude Test, typically pay more for their education, since high scoring applicants are offered discounted tuition in the form of scholarships and other financial aid.<sup>281</sup> These practices are so widespread and well publicized that their fairness is not easily questioned. Assessing the state of American higher education, one commentator has said, with regret but complete accuracy:

[T]he admissions process, at least at the 100 top colleges and universities, is not a meritocracy . . . but a marketplace. Every spot is up for bid. Some people bid with intelligence, which has obvious worth to the institution; some with cold cash, with its certain value; and others with the currency of connections and influence and relationships that serve the institution's interests.<sup>282</sup>

In thinking about the ethical issues related to buying admission into an educational program, it is useful to differentiate undisclosed payments from disclosed payments. The problem with using *undisclosed* payments is not that money is being paid to receive a good education or a prestigious degree, but that the payment is secret. First, the undisclosed nature of the payment raises the prospect that similarly situated applicants will be treated differently, since there is often no way for admitees (or even neutral parties within the institution) to monitor what others are being charged. Such disparate treatment offends deeply held American notions of equal

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<sup>280</sup> See Tamar Lewin, *Public Universities Chase Excellence, at a Price*, N.Y. TIMES, Dec. 20, 2006 (stating that “[p]ublic universities are still far less expensive” than private universities, but “their tuition [is] rising rapidly”). Cf. Jonathan D. Glater, *Weighing the Costs of Public v. Private Colleges*, N.Y. TIMES, Dec. 13, 2006 (reporting that “many debate whether attending private institutions—which charge far more than public universities—is worth the expense”).

<sup>281</sup> See Johnson, *supra* note 69, at \_\_\_\_ (discussing how higher education institutions award scholarships according to a matrix formula where the variables are undergraduate GPA and Scholastic Aptitude test score); Lewin, *supra* note 280 (reporting that at the University of Florida “the state pays 75 percent to 100 percent of tuition and fees for students with high grades and test scores”).

<sup>282</sup> GOLDEN, *supra* note 90.

protection,<sup>283</sup> fair opportunity,<sup>284</sup> and consumer rights.<sup>285</sup> Second, in many cases the under-the-table payment (unlike, for example, the higher tuition charged to lower-test-score admittees) is not devoted to institutional purposes, but enriches the particular recipient of the payment (e.g., the bribe receiver). That usurpage of an institutional business opportunity wrongly diminishes the ability of the educational program to serve its students and the community.<sup>286</sup> Third, and perhaps most importantly, the secretive nature of the payment makes a mockery of expressly or implicitly stated admissions criteria, thereby undermining the institution's commitment to honesty and fair evaluation.

Somewhat different problems are raised by *disclosed* payments that may curry favor with decision makers in the admissions process, such as publicly acknowledged charitable donations to a college or university. In that case, the problem is not secrecy but the appearance of impropriety.<sup>287</sup>

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<sup>283</sup> See Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 25, 32, 33 (2000) (arguing that in "contemporary America, equal treatment is highly prized" and disparate treatment is suspect).

<sup>284</sup> See Johnson, *supra* note 113, at 15 (discussing America's deep commitment to the "level-playing-field" principle, which holds that "in pursuing desirable things in life, each person should have a chance to compete on equal terms—or as Abraham Lincoln said, a 'fair chance in the race of life'").

<sup>285</sup> Cf. Johnson, *supra* note 32, at 749-50 (discussing the relationship between consumer protection and the quest for ethics in government).

<sup>286</sup> An agent has a duty not to usurp business opportunities of the agent's principal. See generally Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 100 n.438 (1988) (stating principle and citing sources).

<sup>287</sup> See generally Christopher R. McFadden, Comment, *Integrity, Accountability, and Efficiency: Using Disclosure to Fight the Appearance of Nepotism in School Board Contracting*, 94 NW. U. L. REV. 657, 658 (2000) (opining that "[t]he appearance of impropriety—even when none exists in fact—can weaken the public's confidence in its government"). Thus, in many situations, it is as important to avoid an appearance of impropriety as to avoid impropriety itself. See, e.g., Johnson, *supra* note 112, at 1025 (discussing the appearance of impropriety concept in judicial ethics). However, it is also important to think precisely about whether there is an appearance of impropriety on a particular set of facts because charges of an appearance of impropriety are themselves potentially damaging. See generally CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 319-22 (1986) (criticizing the appearance of impropriety concept as applied to lawyer conflicts of interest); Cox, *supra* note 113, at 281 (stating that "[unless] used with care, the term 'appearance standard' is misleading. In part, the term is a euphemism sparing those who



The root question is whether publicly disclosed donations are more properly viewed as educational corruption or as acceptable forms of institutional advancement. If the donor's child's credentials are competitive with other admitees, if the gift is public, and if similar giving opportunities are known and available to other persons (if they can afford it), these practices are essentially benign. The admission of a qualified applicant does not dilute the quality of the student body, the receipt of the gift may allow the institution to improve the educational experience of many or all of its students, and the public nature of the gift mitigates the problems associated with secrecy. In the higher education context, this is true at least if the college or university is a *private* entity not funded by the state. Private universities serve noble goals, but they are also businesses. They must pay their bills and balance their books. Fundraising and building an endowment<sup>288</sup> are now essential features of every successful private college or university.<sup>289</sup> A higher education institution that does not garner contributions from sources other than student tuition and fees must require its students to pay more of the real cost of their education, fall behind the academic competition in terms of programs and facilities, or suffer a combination of those calamities. Is there some moral principle that says that a private educational institution cannot prefer a qualified student whose family publicly makes a gift over another qualified student from a non-gift-giving family? If there is, it would seem to be the appearance of impropriety concern. The size and the timing of the gift may call the integrity of the educational institution into question by making it appear that a seat in the class has been bought for an unqualified student, even if that is not true. That in itself may be a good reason why an educational institution should not accept a large gift from the family of a student who is about to apply for admission.

However, if the public contribution is neither particularly large nor closely timed to an admissions decision, it will not appear that special pressure of an economic nature is being used to secure a seat in the class for an unqualified student. This would be the case, for example, where parents, who are alumni of a college or university to which their child later applies, make

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violate the principle the full opprobrium heaped upon one who consciously takes a bribe”).

<sup>288</sup> Fifty-six American universities have endowments exceeding a billion dollars. See Justin Pope, *More Colleges Join an Elite Rank*, CHI. TRIB., Jan. 23, 2006, at 14, 2006 WLNR 7216370 (listing top university endowments). See also Jonathan D. Glater & Alan Finder, *In Tuition Game, Popularity Rises With Price*, N.Y. TIMES, Dec. 12, 2006 (reporting that “Swarthmore’s \$1.3 billion endowment . . . throws off enough income to cover 43 percent of the operating budget,” which means that while “Swarthmore spends about \$73,690 a student [annually] . . . its tuition, room, board and fees in the last academic year were little more than \$41,000”).

<sup>289</sup> See Richard C. Levin, *Preparing for Global Citizenship: The Freshman Address*, YALE ALUMNI MAG., Nov.-Dec. 2006 (indicating that Levin, President of Yale University, told the entering class of 2010, that alumni contributions past and present were “footing half the bill for your education”).

modest annual contributions to their alma mater over a period of years. On those facts, is it improper for the institution to prefer that particular applicant to other applicants from families with no giving history? Probably not—at least so long as the applicant is competitive with other members of the entering class.

*Public* educational institutions differ from their private college and university counterparts. “[P]ublic universities were founded on the premise that they would provide broad access in exchange for taxpayer subsidies.”<sup>290</sup> When public monies are used to fund an educational endeavor, it is easier to argue that there should be no distinction between rich and poor<sup>291</sup>—between students from wealthy donor families and students from families unable to make gifts. Yet, it is increasingly the case that public institutions, too, are dependent on private fund raising,<sup>292</sup> for legislatures are less and less willing to invest adequately in public higher education.<sup>293</sup> To that extent, it is harder to draw a distinction between private and public educational enterprises.

Regardless of whether a university is public or private, if any of the variables carefully stated above change, a different analysis is required. If the student is not qualified, if the gift is not public, or if others do not have similar giving opportunities—it is easy to see an admissions related gift as corrupt because it prefers an unqualified applicant based on financial considerations, violates principles of openness or equal opportunity, or creates an appearance of impropriety.

In any event, all colleges and universities should provide applicants with honest information about their chances of admission. Thus, as one former Ivy League admission officer argues:

Colleges should admit . . . that in general, 10% of a class is reserved for legacies

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<sup>290</sup> Editorial, *Public Colleges as “Engine of Inequality,”* N.Y. TIMES, Nov. 23, 2006, at A30.

<sup>291</sup> See Lewin, *supra* note 280 (quoting Kati Haycock, director of the Education Trust, an advocacy group, as stating that “[p]ublic universities were created to make excellence available to all qualified students”). Cf. *Second Act*, YALE ALUMNI MAG., Nov./Dec. 2006, at 22 (quoting University of Oklahoma president David Boren as stating that a public university, unlike a private university, is answerable to “the governor, the legislature, and the public”).

<sup>292</sup> See Julie Sturgeon, *Excuse Me: Can You Spare a Million*, UNIV. BUSINESS, Jan. 2007, at 43 (discussing the growing role of private dollars in public higher education).

<sup>293</sup> See Katherine C. Lyall & Kathleen R. Sell, *The De Facto Privatization of American Public Higher Education*, CHANGE, Jan 1, 2006, at 6, 2006 WLNR 9872224 (discussing declining state support per student).

and another 10% for recruited athletes. Schools should acknowledge that students from wealthy families enjoy better odds. . . . [They should] confess that an “unhooked” applicant’s odds are significantly less than those published in college view books. . . .<sup>294</sup>

## B. Plagiarism

Plagiarism is a worldwide problem<sup>295</sup> which has been greatly aggravated by the availability of virtually endless text to “cut-and-paste” from the Internet into research papers and scholarly publications. The failure to properly attribute information not only gives some students an unfair advantage in satisfying academic requirements, but, when exposed, reflects badly on innocent students by calling their own academic integrity into question merely as a result of their association with a college or university where plagiarism occurs.<sup>296</sup>

The key dispute with respect to penalizing plagiarism concerns culpability. Some argue that only intentional appropriation of the words of another should give rise to liability; others argue that any failure to attribute sources violates the ethical principles against plagiarism.<sup>297</sup> Of course, there is a middle ground between intentional wrongdoing and strict liability, which is to require evidence of lack of care (negligence or recklessness). However, there is great dispute as

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<sup>294</sup> William Caskey, *College Admission: The Board Game*, USA TODAY, Mar. 14, 2007, at 11A, 2007 WLNR 4775018.

<sup>295</sup> See Bloom & Higgins, *supra* note 133 (stating that “plagiarism has crept across continents. It is endemic in the US, despite honour codes and technological gizmos to catch it . . . [T]he significant increase in levels of plagiarism is one of the unintended effects of the access to information that the web offers”). See, e.g., Paul Bass, *Is Plagiarism on the Rise?*, YALE ALUMNI MAG., Jan./Feb. 2007, at 61 (discussing plagiarism in the Yale University undergraduate and graduate programs and at other campuses); Kosci-Harmatiy, *supra* note 3 (indicating that conference participants reported that plagiarism was “the greatest transgression among Ukrainian student who feel no obligation to present their work honestly”).

<sup>296</sup> See Geoffrey Maslen, *Malaysian MBA Students Fear for Their Careers*, S. CHINA MORNING POST, Aug. 30, 2003, at 2, 2003 WLNR 5886039 (reporting that “Malaysian students who enrolled in an MBA course with the University of Newcastle, near Sydney, [Australia, said that] . . . their employment prospects . . . [had] been seriously affected after charges of plagiarism were made against others in the course”).

<sup>297</sup> See Kavita Kumar, *SIU Spatting Over Plagiarism—Or is it Over Leadership?*, ST. LOUIS POST-DISPATCH, Aug. 6, 2006, at B1, 2006 WLNR 13593381 (stating that a university president “wrote that plagiarism requires deliberate intent and personal gain,” but that an expert from a Center for Academic Integrity at another university “said that plagiarism is using the words or ideas of another without attribution”).

to whether culpability (intent, recklessness, or negligence) is an element of the offense of plagiarism, or whether culpability bears only upon the issue of what sanction is appropriate. These concerns can be addressed by a well-draft ethics code, but many codes of conduct fail to do so.

Some colleges and universities are taking concrete steps to raise awareness about plagiarism. At Yale University, for example, students are not able to register for courses until they complete an “online ‘educational module’ with questions and answers about what constitutes plagiarism.”<sup>298</sup> There are other low-tech approaches to discouraging and detecting intellectual dishonesty in written work. One scholar recommends that professors:

[L]ook for “anomalies” in students’ writing, words they don’t normally use. Have students read and critique each other’s work to increase a sense of community and responsibility. Make assignments specific, to limit the universe of papers pluckable from the Web—and to make students think harder and produce more-original work. Assign drafts and outlines, to start students thinking and researching and to help them avoid last-minute crunches which can increase the temptation to look for help on Google at 3 a.m.<sup>299</sup>

One expert’s review of American case law caused him to conclude that “[c]areers are ruined because plagiarism is fiercely policed in universities as if it is one of the seven deadly sins. . . . [U]niversity administrators drum both student and teacher plagiarizers out of the academy.”<sup>300</sup> However, others say that plagiarism is often overlooked.<sup>301</sup> In some cases, reluctance to crack down on plagiarism may be attributable to the fact that administrators at institutions that have done so have been targeted by efforts which have brought unwanted scrutiny to their own lapses in attribution. At one university, supporters of a faculty member fired for plagiarism:

went after the business school dean’s welcome message on a university Web site. Then they raised questions about other professors’ academic work, a speech by

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<sup>298</sup> See Bass, *supra* note 295, at 64 (discussing a program that becomes mandatory at Yale in 2008).

<sup>299</sup> *Id.* at 65 (attributing the suggestions to Bill Rando of the McDougal Graduate Teaching Center at Yale University).

<sup>300</sup> Roger Billings, *Plagiarism in Academia and Beyond: What is the Role of the Courts?*, 38 U.S.F. L. REV. 391, 391 (2004) (arguing that judges overseeing plagiarism litigation should not employ de novo review to second guess university findings that plagiarism was committed).

<sup>301</sup> See Bloom & Higgins, *supra* note 28 (discussing pressure in academia to excuse plagiarism).

one chancellor, and then of another chancellor—all the way up to questioning the university president's Web site.<sup>302</sup>

Aside from cut-and-paste plagiarism is the related problem of customized papers purchased from vendors who frequently operate over the Internet.<sup>303</sup> This form of academic fraud is vastly more blatant than the type of misattribution that results from an erroneous understanding of the rules on citation or simple inadvertence. A student who submits a paper that is nothing more than customized plagiarism normally should be subject to stringent sanctions.

### C. Bogus Degrees

The marketing of academic degrees that require little or no work by recipients, or are purely fraudulent, is a persistent problem in the field of education. These “bogus” degrees take many forms. Some vendors offer correspondence or online programs that entail little in the way of student testing and evaluation. Others re-market previously issued<sup>304</sup> or fake<sup>305</sup> diplomas.

The law can address these problems in a variety of ways. State attorneys general can deter the marketing of bogus degrees by filing suits against vendors under deceptive trade practices laws.<sup>306</sup> Legislative bodies can revoke the tax-exempt status of educational institutions that market bogus degrees.<sup>307</sup> In addition, accrediting agencies and related entities can use their

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<sup>302</sup> See Kumar, *supra* note 297; *Plagiarism*, *supra* note 268 (stating that there are hundreds of websites that offer such services).

<sup>303</sup> See Alexia Elejalde-Ruiz, *Cheatin' Cheaters: Custom Term Papers that Can be Bought on the Internet are Tempting to Stressed-Out Students—But Do They Make the Grade? We Find Out*, CHIC. TRIB., Oct. 16, 2006, at 6 (discussing the purchase and use of “custom papers”).

<sup>304</sup> See *Plagiarism*, *supra* note 268 (stating that “some Internet firms . . . peddle previously issued diplomas that they acquire from academics”).

<sup>305</sup> See Jim Bucknell, *Survey to Target Phoney Operators*, AUSTRALIAN (Newspaper), Mar. 5, 2003, at 21, 2003 WLNR 7596999 (reporting that “Internet degree mills continue to expand worldwide, and offers of fake degrees from Australian and other universities” and on numerous websites).

<sup>306</sup> Cf. Editorial, *The Correct Grade—F, Attorney General Closes Diploma Mill*, PITTS. POST-GAZETTE, July 12, 2005, at B6 (discussing the forced closing of a “university” located in an industrial park which sold degrees online).

<sup>307</sup> Cf. Editorial, *supra* note 9 (reporting that “[t]he House Ways and Means Committee sent shock waves through college sports when it asked the National Collegiate Athletic

powers—which to some extent rest on the common law of associations<sup>308</sup>—to punish or exclude those educational institutions which engage in questionable degree-granting practices. For example, the National Collegiate Athletic Association “has begun to scrutinize nontraditional schools for their academic programs and has actually decertified some.”<sup>309</sup>

## VI. A Battle Never Finally Won

The quest for high ethical standards in education is a goal never permanently achieved. New students, faculty members, and administrators replace their predecessors, and these changes in personnel, along with new technologies and business practices, multiply the opportunities for corruption. Often, it is necessary for one generation of academicians to re-conquer ethical territory firmly held not long before. But, comfortingly, it is also possible for a new group of actors in higher education to successfully fight corruption where their earlier counterparts had failed.

The key to success in this never ending battle against the forces of corruption is to draw upon the insights and tools that have been developed in other similar contexts where progress has already been made. The wisdom that has emerged from efforts to foster ethics in government or ethics in the professions offers valuable insights for crafting a regime composed of ethical principles and legal restrictions to promote ethics in higher education. Prudent use of these resources for formulating “basic principles” and “best practices” can provide reformers with the firm ethical footing and moral support that they need for minimizing the harm caused by corruption in education.

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Association to justify its federal tax exemption by explaining how cash-consuming, win-at-all-cost athletics departments serve educational purposes”).

<sup>308</sup> See generally Development in the Law, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 1006, 1006 (1963) (discussing common law limitations on group activities); Zechariah Chafee, *Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1015 (1930) (similar). See also *Tedeschi v. Wagner College*, 427 N.Y.S.2d 760, 767 (1980) (stating that the “law of associations accords judicial relief to an association member suspended or expelled without adherence to its rules,” but noting that “[t]he parallel between associations and universities is, of course, not exact”).

<sup>309</sup> See Editorial, *supra* note 101 (stating also that the NCAA has “stepped up its review of athletes’ transcripts and will pay special attention to athletes who attended several schools, showed sudden and implausible jumps in grade-point average, transferred to another school late in the senior year or took an implausible number of courses in one semester”). Cf. Lederman, *supra* note 130 (reporting that college and university “presidents have toughened the NCAA’s academic rules and limited time demands on players to give athletes a better shot at getting an education and earning their degrees”).